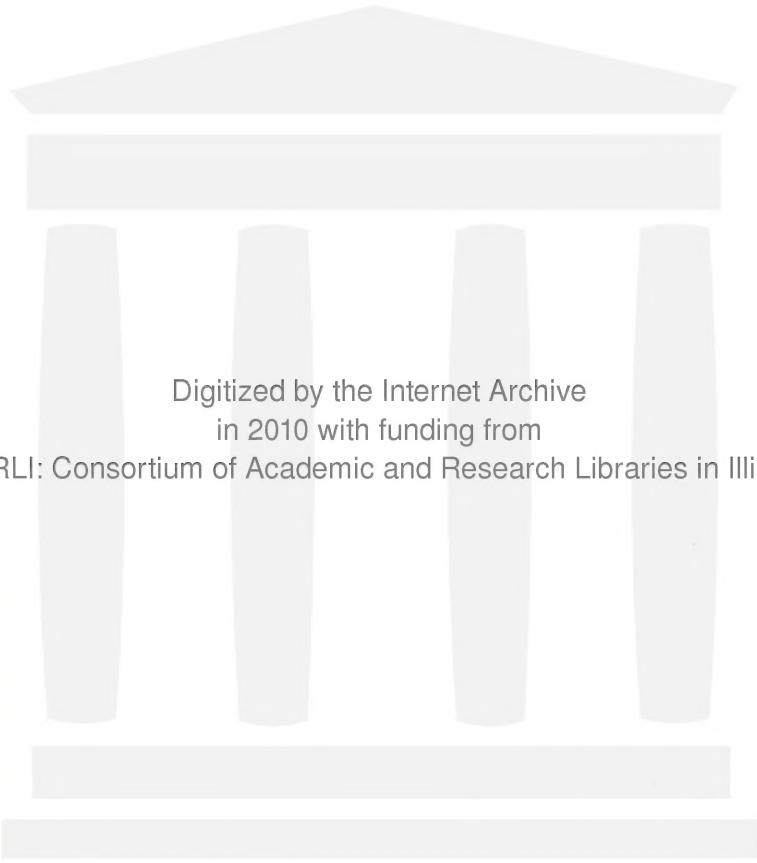




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258 I.A. 605¹

Filed alone June 18, 1930

34476

ILLINOIS STANDARD MANUFACTURING
COMPANY, a Corporation,
Appellee,

vs.

ERNEST REICH and HENRY BLECH,
Appellants.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an order for a temporary injunction issued without notice upon the filing of the bill. The bill was filed March 4, 1930, and the injunction issued on the same date, complainant giving bond to defendants in the sum of \$1,000.

The order restrained defendants Reich and Blech from selling, assigning, encumbering, hypothecating or otherwise disposing of certain letters patent and reissue letters patent of the United States, from making and asserting any claim of ownership under the same, and from communicating with the agents and customers of the complainant, claiming infringement of patents or otherwise, until the further order of the court.

On March 11th defendants entered their appearance and on March 18th thereafter filed a joint and several demurrer. On March 24th defendants moved to dissolve the injunction. The motion was denied and a rule to answer entered. On April 2nd thereafter an order was entered on motion of defendants, granting an appeal to this court from the order of March 24th denying the motion to dissolve. This was allowed upon defendants giving a bond in the sum of \$200, which was approved by the clerk of the court.

The bill alleges that complainant is a corporation organized under the laws of this state for pecuniary profit; that defendant Reich on December 19, 1929, was engaged to enter the employ of complainant under an agreement to devote his entire time and best

2581A-605

Filed June 18, 1930

14475

IN RE: ESTATE OF JAMES H. HARRIS, deceased.
JAMES H. HARRIS, a corporation,
Appellant.

WILLIAM H. HARRIS and ARTHUR HARRIS,
Appellees.

INTERMEDIATE

COURT OF APPEALS
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

APPEAL FROM THE DECISION OF THE COURT
IN THE ESTATE OF JAMES H. HARRIS, deceased.

This is an appeal by appellees from an order for a temporary injunction issued without notice upon the filing of the bill. The bill was filed March 1, 1930, and the injunction issued on the same date, complaining of the conduct of appellees in the sum of \$1,000.

The order restrained appellees from and from from selling, assigning, encumbering, hypothecating or otherwise disposing of certain letters patent and related letters patent of the United States, from making and executing any kind of conveyance under the same, and from communicating with the agents and employees of the complainant, including infringement of patents or otherwise, until the further order of the court.

On March 15th appellees entered their final appearance and on March 15th James H. Harris filed a joint and several demurrer. On March 15th demurrer moved to dissolve the injunction. The motion was denied and a rule to answer entered. On April 1st demurrer was entered on motion of appellees, granting an appeal to this court from the order of March 15th denying the motion to dissolve. This was allowed upon appellees giving a bond in the sum of \$500, which was approved by the clerk of the court.

The bill alleges that complainant is a corporation organized under the laws of this state for pecuniary profit; that defendant Harris on December 19, 1929, was engaged to enter the employ of complainant under an agreement to devote his entire time and best

efforts in the interest of complainant and under the direction of its officers and directors; that certain letters patent were owned by C. V. Champion & Co., Inc., of the city of Danville, Illinois, and covered an invention or improvement for toasting or cooking apparatus; that the owner became bankrupt on December 1, 1929; that a trustee was duly appointed on December 15th thereafter and an order was entered in the bankruptcy proceedings directing the trustee to sell the interest of the bankrupt in these letters patent; that complainant told its employee, Reich, of the advisability of purchasing in behalf of complainant these patents and informed said Reich that the secretary and treasurer of complainant or some other officer would proceed to Danville for the purpose of submitting a bid and purchasing the same; that Reich, conspiring and confederating with Blech and intending fraudulently to personally acquire these patents, in opposition to and in fraud of the rights of complainant, persuaded one Polachek to permit him, Reich, to act for complainant in the purchase of the patents and represented that he, Reich, would in behalf of complainant attend the sale of these bankrupt assets and purchase the patents in behalf of complainant for the best price obtainable; that he, Reich, would act as the sole confidential representative of complainant; that complainant offered to furnish him with \$5,000 in certified checks for the purpose of protecting its bid; that with the intention to defraud, Reich represented to complainant that he would first ascertain the amount required and would inform complainant and permit it to supply the exact amount required with which to purchase the patents and other property belonging to the bankrupt; that Blech, the other conspirator and defendant, is an attorney at law and has been the personal counsel and adviser of Reich; that Reich, acting in apparent conformity with his instructions from complainant and in apparent conformity with his agreement, on December 23, 1929,

attests in the interest of complainant and under the direction of
the officers and directors; that certain letters patent were owned
by S. V. Champion & Co., Inc., of the city of Louisville, Illinois,
and covered an invention of improvement for locating or locating ap-
paratus; that the same became bankrupt on December 1, 1932; that a
trustee was duly appointed on December 15th thereafter and an order
was entered in the bankruptcy proceedings directing the trustee to
sell the interest of the bankrupt in those letters patent; that
complainant sold its interest, being, of the advisability of sell-
ing, in behalf of complainant, those patents and interest said
patents and interest, and thereafter of assignment or sale; that
offeror would proceed to Louisville for the purpose of acquiring a
bid not purchasing the same; that said, complainant and complainant
ing with such and intending to purchase the same; that complainant
these patents, in opposition to and in violation of the rights of com-
plainant, purchased and assigned to parties who, said, as set for
complainant in the purchase of the patents and represented that he,
said, would in behalf of complainant assign the rights of these patents
right assets and purchase the patents in behalf of complainant for
the best price obtainable; that he, said, would not be the sole
confidential representative of complainant; that complainant dis-
posed to transfer him with \$2,500 in certified checks for the pur-
pose of purchasing the said; that with the intention to defraud,
said represented to complainant that he would first ascertain the
amount required and would in turn assign to complainant in so doing
the exact amount required with which to purchase the patents and
other property belonging to the bankrupt; that said, two other
complainant and defendant, in an attempt to defraud and have been the
personal counsel and adviser of said; that said, acting in ap-
parent concert with his interest, the two complainants and in
secret conspiracy with his interest, on December 15, 1932,

went to Danville; and he took Blech with him and pursuant to the conspiracy and in violation of the trust reposed in him, with Blech purchased these patents for the sum of \$1,300, Blech having bid that amount and defendant Reich not having submitted any bid on behalf of complainant. The bill prayed that defendants be required to turn over to complainant the property purchased, for an accounting, a permanent injunction and other relief.

Defendants argue, first, that the court was without jurisdiction to grant the injunction because the states have granted to the Federal government jurisdiction to pass upon questions arising with reference to the infringement of patents. This suit, however, does not involve any question as to the infringement of rights under any patent. The question of the validity of the patents or the infringement of the same is not an issue but is only incidentally involved in the case. The contention is without merit. St. Louis v. Sanitary, etc., 101 Fed. 720; Wilson v. Dunford, 10 Howard 99.

Defendants next urge the proposition that a fiduciary relation between employer and employee based solely on the element of employment will not establish a trust ex maleficio by mere proof of conversations and promises, in which subject the employer has no interest. They cite two cases (Hogers v. Strong, 55 Ill. 52; Lantry v. Lantry, 51 Ill. 430) to this point. The cases are not at all applicable. Not only are they distinguishable on other material facts, but the subject matter of the alleged trust in each of them was land and the controlling question was whether alleged oral conversations were sufficient to take the case out of the operation of the Statute of Frauds. The property here involved was personalty, and no question with reference to the Statute of Frauds arises on the record.

The case as made out by the bill (the material allega-

tions of which, so far as the same are well pleaded, must be conceded to be true) is one where an employee, who was entrusted with the duty of purchasing property in behalf of his employer, conspired with his own attorney to buy the property for himself and the attorney, to the injury and against the rights of his employer. In so doing he violated a simple and fundamental duty due from every employee to his employer and from every agent to his principal.

Assuming the facts alleged in the bill to be true, as we must, the court rightly issued an injunction which would continue the status quo until the case might be heard upon its merits. Dennis v. McCagg, 32 Ill. 429; Davis v. Hamlin, 106 Ill. 39; Mechem on Agency, 2nd ed., vol. 1, sec. 1192; 21 R.C.L. 325, sec. 10.

The order is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

34362

CHICAGO TITLE & TRUST CO.,
a Corporation,

Complainant,

v.

TOWER BUILDING CORP.,
JAMES H. HOOPER, et al.,

Defendants,

HOLMAN D. PETTIBONE, Receiver,

Appellee,

v.

JAMES H. HOOPER,

Appellant.

2581A 605²

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 25, 1930

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from an Interlocutory Order entered February 28, 1930, by the Circuit Court of Cook County in Chancery. The opening statement contained in the brief of appellant, is as follows: "This is an appeal from an interlocutory order entered February 28, 1930, enjoining the collection of money received as rents." This statement is ambiguous but, by reference to the record, it appears that the order of February 28, 1930, was, in fact, an order to restrain the defendant Hooper from prosecuting a suit in the Municipal Court against the Chicago Title & Trust Company. This suit appears to have been brought by Hooper to recover rents already collected by the Chicago Title & Trust Company, prior to the appointment of the receiver herein. A reference to the record shows that the bond filed in this appeal was signed February 11, 1930, and that the order itself was not

Opinion filed June 28, 1950

THE UNITED STATES OF AMERICA, Plaintiff,

vs. JAMES EARL RAY, Defendant.

On the motion of the Defendant, the Court has considered the evidence and the law, and has concluded that the Defendant is not guilty of the crime charged in the indictment.

The evidence presented at the trial was insufficient to establish the guilt of the Defendant beyond a reasonable doubt. The Court finds that the Defendant is not guilty of the crime charged in the indictment.

The Court has considered the evidence and the law, and has concluded that the Defendant is not guilty of the crime charged in the indictment. The Court finds that the Defendant is not guilty of the crime charged in the indictment.

The Court has considered the evidence and the law, and has concluded that the Defendant is not guilty of the crime charged in the indictment. The Court finds that the Defendant is not guilty of the crime charged in the indictment.

entered until February 16th of the same year. The bond was filed and approved March 13, 1930, but there is no accompanying explanation as to why the bond was signed over two weeks prior to the entry of the order.

It is urged as ground for reversal of this interlocutory decree that the bill failed to make certain persons parties defendant. This question has already been passed upon by this court in the case of Chicago Title & Trust Company, Trustee, Appellee, v. Tower Building Corporation, et al, James Hooper, Appellant, General Number 34322. The grounds presented for reversal in this case are the same as those in the cause referred to, and we see no reason for departing from the views expressed in the opinion in that case.

For the reasons stated in Chicago Title and Trust Company, Trustee, Appellee, v. Tower Building Corporation, et al, James Hooper, Appellant, General Number 34322, Appellate Court for the First District of Illinois, the interlocutory order of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

MOLLOD, P.J. AND HERREL, J. CONCUR.

217
256 144. 605
33873

EDWARD F. SMITH,
Appellant,

v.

CITY OF CHICAGO,
a corporation,
Appellee.

Appeal from Circuit Court

of Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED
THE OPINION OF THE COURT.

This appeal by plaintiff from a judgment entered in favor of the City of Chicago in the trial court involves the same question with reference to the proper construction of the Local Improvement act that is considered in an opinion this day filed in University of Chicago, a corporation, appellant, v. City of Chicago, a corporation, appellee, Gen. No. 33,873.

For the reasons stated in that opinion, the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

McGraw, J., concur.
O'Connor, J., dissents.

33874

22 2581A. 306

WILLIAM G. MC CONNICK,
appellant,

v.

CITY OF CHICAGO,
a corporation,
appellee.

} Appeal from Circuit Court
of Cook County.

MR. PRESIDING JUSTICE MCHENRY DELIVERED
THE OPINION OF THE COURT.

The question to be decided on this appeal is similar to that presented in University of Chicago, a corporation, appellant, v. City of Chicago, a corporation, appellee, Gen. No. 33,872, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause, the judgment here is reversed and the cause remanded.

APPROVED AND FORWARDED,

McSurely, J., concurs.
O'Connor, J., dissents.

22875

UNIVERSITY OF CHICAGO,
a corporation,
appellant.

v.

CITY OF CHICAGO,
a corporation,
appellee.

253 I.A. 806²

Appeal from Circuit Court
of Cook County.

MR. PRESIDING JUSTICE MACHETT DELIVERED
THE OPINION OF THE COURT.

In Cause Gen. No. 23,873, which involves a
similar proceeding between the parties herein, an opinion
this day is filed reversing the judgment.

For the reasons stated in that opinion, the
judgment here is also reversed and the cause remanded.

RECORDED AND RETURNED.

McMurely, J., concurs.
O'Connor, J., dissents.

33874

CHARLES F. GREY, et al.,
Appellants,

v.

CITY OF CHICAGO,
a corporation,
Appellee.

Appeal from Circuit Court,

Cook County.

25611 306³

MR. PRESIDING JUSTICE: I HEREBY ANNOUNCE
THE OPINION OF THE COURT.

The question arising on this appeal is decided
in University of Chicago, a corporation, appellant, v. City
of Chicago, a corporation, appellee, Gen. No. 33,872, in an
opinion this day filed.

For the reasons stated in that opinion, this
judgment is also reversed and the cause remanded.

ATTORNEY GENERAL.

McSurely, J., concurs.
O'Connor, J., dissents.

34049

C. F. HURBURN,
Defendant in Error.

vs.

ERNEST J. BATTEN,
Plaintiff in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

253,46084

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On August 15, 1929, plaintiff Hurburn caused a judgment by confession to be entered against defendant Batten for the sum of \$23,030.88. The judgment was confessed for an amount overred to be due upon a promissory note for \$27,000, dated March 1, 1928, to the order of the bearer, due on or before April 1, 1928, with interest payable at maturity at 7% per annum and 7% after maturity.

This note contained a power of attorney which stated that to secure the payment thereof any attorney at law was thereby authorized to enter the appearance of the maker in any court of record at any time after the execution thereof, waive service of process, accept a declaration and confess judgment in favor of the legal holder of the note for such amount as might appear to be unpaid thereon, and also for reasonable attorney's fees, with costs of suit; to file a cognovit therefor; to release all errors which might intervene in such proceeding, and to consent that no writ of error or appeal should be prosecuted on such judgment or any bill of equity filed to restrain or interfere in any manner with the operation of said judgment or any execution issued thereon.

On September 11, 1929, defendant made a motion to vacate this judgment. The motion was supported by a verified petition, which was afterwards amended, and on October 7th the motion was denied but the judgment was reduced to the sum of \$9549 and costs. By agreement of the parties on November 2nd

thereafter that order was vacated except as to that part thereof giving defendant leave to file an amended petition, and upon consideration of the amended petition, the court entered an order overruling the motion of defendant to vacate the judgment by confession but ordering that the judgment theretofore entered should be reduced to \$9099, including as part of said judgment the sum of \$450, which was allowed to plaintiff as his attorney's fees for entering said judgment. That judgment so entered, defendant seeks to reverse by this writ of error.

Defendant contends that the judgment should have been set aside in toto. The rule to be applied in such case is so well settled as to make citation of authorities unnecessary. The affidavit in support of such motion is construed strictly against defendant, counter-affidavits are not permitted to be filed, and if the affidavit when strictly construed discloses a meritorious defense, the judgment should be opened up and defendant permitted to file pleas.

The defenses set up in the amended petition are that the note was given in a transaction tainted with usury; that certain payments had been made thereon; that the note had been in fact fully paid, with the exception of \$8,649; that in order to avoid litigation after plaintiff had acquired the note, defendant on April 4, 1929, tendered to plaintiff the sum of \$10,000 in United States gold certificates, which amount was more than \$2,250 over and above what was due to plaintiff, but that plaintiff refused to accept the amount on the ground that the same was insufficient; that by virtue of such tender and offer the power of attorney to confess judgment in the note, which was executed as a part of the security for the loan, was exhausted, cancelled and rendered null and void.

The principal contention of defendant upon this writ

of error concerns this alleged tender, which he urges discharged the power of attorney, although it is not averred that the tender was made on the day the note fell due, or that it was kept good, and no proferri in curia was made. Indeed, the bill of exceptions shows that after this defense was set up the attorney for plaintiff offered in open court to accept the amount tendered but the money was not forthcoming. Not only this, but defendant in his affidavit of merits attempts to interpose a defense to the whole claim upon the ground that the transaction in which money was loaned to him was, in fact, ultra vires a corporation, whose money it is averred was loaned. Defendant appears in the rather inconsistent situation of insisting that the tender on which he refuses to make good destroyed the power to confess judgment and at the same time interposing a defense that would prevent plaintiff from recovering at all.

In support of his contention defendant cites and relies on Kortright v. Cady, 31 E. T. 354, where a divided court held that the ancient rule of the common law to the effect that, in case of a mortgage or pledge, a tender of the full amount due made upon the law day would have the effect of discharging the security, was applicable to mortgages executed in the state of New York. Two Appellate court cases, in which the common law rule has been held applicable to cases where specific property was held by a debtor for the payment of a debt or claim, are also cited. McPherson v. James, 69 Ill. App. 337, and Schwartz v. Chicago State Pawnbrokers Society, 195 Ill. App. 93. The doctrine of Kortright v. Cady has been repudiated by the courts of this state in Crain v. McGoon, 96 Ill. 431, and numerous cases which follow that decision. Aulger v. Clay, 109 Ill. 487; Realy v. Protection M. Fire Ins. Co., 213 Ill. 99; Blain v. Foster, 33 Ill. App. 297; Dunbar v. Selzer,

44 Ill. App. 615; Glen v. E. E. C. & L. Assoc. 86 Ill. App 631.

The subject is discussed in a note to the case of Parker v. Haasley, 33 L. R. A. 231 (116 N. C.1) and the author of that note, after reviewing the decisions in the different states, gives his conclusions as follows:

"The rule in regard both to real estate and chattel mortgages in case of a tender at maturity so far as cases have been decided seems to hold that the lien of the mortgage is thereby discharged whether the tender is kept good or not.

In case of a tender after maturity the rule in regard to real estate mortgages differs in the different states. In Indiana, Michigan, New York and South Carolina a proper tender after maturity discharges the lien without keeping it good. In Alabama, Arkansas, Florida, Illinois, New Hampshire, and Vermont an unaccepted tender does not discharge the lien.

In all the states the tender must be absolute and unconditional and the mortgagee must be given a reasonable time to compute the amount due in order to discharge the lien, and if he refuses the tender in good faith, even though the tender is sufficient, the lien will not be discharged.

* * * * *

In case of chattel mortgages * * * In Alabama, Nebraska, Illinois, and Missouri the tender must be kept good to effect a discharge. * * *

In case of a pledge the rule seems to be almost universal that an unaccepted tender of the amount due, even though made after maturity of the debt and not kept good, discharges the lien."

It appears from defendant's own affidavit that the judgment of the court represents the actual amount which is due upon the note after all usury has been eliminated, plus an attorney's fee of \$490. This part of the amended affidavit has not been fully abstracted, but is found on page 32 of the record. The note sued on describes a large amount of collateral deposited as security for the payment of it. We hold a tender such as the amended affidavit avers defendant made, was not sufficient to discharge the security or revoke the power of attorney and that the affidavit wholly fails in these respects to establish a meritorious defense as against the judgment entered.

The amended affidavit, however, further purports to set up as a defense that the transactions with reference to the original loan and succeeding loans were in the interest of the Automobile

Bonding Company, a corporation, were ultra vires and without its charter powers, and that the note is for that reason void. It also avers that plaintiff took the note with full knowledge of the fact that these transactions insofar as the corporation was concerned were prohibited by statute and were therefore illegal.

Practically all the leading cases in this State on the doctrine of ultra vires from National Home Bldg. Assoc. v. Home Savings Bank, 131 Ill. 35, to G. & C. Canal & Dock Co. v. Conkling, 273 Ill. 313, are cited, and the distinction between cases in which a corporation acts by abuse of or in excess of power actually granted and those in which it acts wholly without and beyond its powers, is pointed out. We are not unacquainted with these cases.

The note for \$30,000 given on March 30, 1927, in the original transaction is found on page 25 of the record. It is signed by defendant and is by its terms payable to the order of Samuel H. Friedstein. The note, upon which suit is brought, dated March 1, 1928, while payable to the order of bearer, is payable at the office of Samuel H. Friedstein & Co. The amended affidavit avers that Friedstein, although ostensibly the principal, was in fact the agent and "dummy" of the Automobile Bonding Company. The amended affidavit avers that defendant did not at any time know that the corporation was a party to the transaction. The corporation is not a party to this suit. What the arrangement may have been between Friedstein and the corporation; whether Friedstein did or did not obtain the money which was a loan to defendant from the corporation, are not matters which concern this defendant, nor are the same in any way material to the issues arising in this suit. Under this state of facts defendant is in no position to raise the question. The rule of ultra vires is not intended to assist defendants to escape their just liabilities nor to grant license to

commercial piracy.

Plaintiff has not appeared in this court to defend the judgment, but the record shows conclusively that defendant is justly indebted for the amount in which judgment was entered against him, and his affidavit, fairly construed, fails to show any meritorious defense to the judgment or any part of it.

The order of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, J., concurs.

McSweeney, J., dissenting: I think the defendant should have been permitted to make his defense.

34079

2531A. 867

UNITA MC CONNICK BLAINE,)
Appellant,)
v.)
CITY OF CHICAGO.)
a municipal corporation,)
Appellee.)

Appeal from Superior Court
of Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED
THE OPINION OF THE COURT.

The question arising on this appeal is decided
in an opinion this day filed in this court in University of
Chicago, a corporation, appellant, v. City of Chicago, a
corporation, appellee, Gen. No. 33,873.

For the reasons stated in that opinion, the
judgment here is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurdy, J., concurs.
O'Connor, J., dissents.

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34080

274
FOURMAN TRUST & SAVINGS BANK,)
a corporation,)
Appellant,)

Appeal from Superior Court.

v.)

Cook County.

CITY OF CHICAGO,)
a corporation,)
Appellee.)

85-1-3072
MR. PRESIDING JUSTICE MCGHEEY DELIVERED
THE OPINION OF THE COURT.

The question arising upon this record is
decided in an opinion this day filed in this court in
University of Chicago, a corporation, appellant, v. City
of Chicago, a corporation, appellee, Gen. No. 85,872.

For the reasons stated in that opinion, the
judgment here is also reversed and the cause remanded.

REVEREND AND HONORABLE,

McSurely, J., concurs.
O'Connor, J., dissents.

287

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250 A.H. 007

MR ROY D. MCILLOUGH,)
appellant.)
v.)
CITY OF CHICAGO,)
a corporation.)
appellee.)

Appeal from Superior Court
of Cook County.

MR. PRESIDING JUSTICE MARCHETT DELIVERED
THE OPINION OF THE COURT.

The question arising upon this record is
decided in University of Chicago, a corporation, appellant,
v. City of Chicago, a corporation, appellee, Sen. No. 33,672,
in which an opinion is this day filed.

For the reasons stated in that opinion, this
judgment also is reversed and the cause remanded.

REVERSED AND REMANDED. *cc to Chicago*

McSurely, J., concurs.
O'Scanner, J., dissents.

The first part of the report is devoted to a description of the work done during the year. It is divided into two main sections, the first of which deals with the work done in the laboratory and the second with the work done in the field. The first section is divided into three parts, the first of which deals with the work done in the laboratory during the first half of the year, the second with the work done during the second half, and the third with the work done during the year as a whole. The second section is divided into two parts, the first of which deals with the work done in the field during the first half of the year, and the second with the work done during the second half.

The second part of the report is devoted to a description of the results of the work done during the year. It is divided into two main sections, the first of which deals with the results of the work done in the laboratory and the second with the results of the work done in the field. The first section is divided into three parts, the first of which deals with the results of the work done in the laboratory during the first half of the year, the second with the results of the work done during the second half, and the third with the results of the work done during the year as a whole. The second section is divided into two parts, the first of which deals with the results of the work done in the field during the first half of the year, and the second with the results of the work done during the second half.

The third part of the report is devoted to a description of the conclusions of the work done during the year. It is divided into two main sections, the first of which deals with the conclusions of the work done in the laboratory and the second with the conclusions of the work done in the field. The first section is divided into three parts, the first of which deals with the conclusions of the work done in the laboratory during the first half of the year, the second with the conclusions of the work done during the second half, and the third with the conclusions of the work done during the year as a whole. The second section is divided into two parts, the first of which deals with the conclusions of the work done in the field during the first half of the year, and the second with the conclusions of the work done during the second half.

24082

AUGUST VON OLAHN and
LAURA VON OLAHN, his wife,)
Appellants.)

v.)

CITY OF CHICAGO,
a corporation,)
Appellee.)

29 A
Appeal from Superior Court
of Cook County

258 I.A. 808

MR. PRESIDING JUSTICE HATCHETT delivered the
opinion of the court.

The question arising upon this record is the
same as that considered and decided in University of Chicago,
a corporation, appellant, v. City of Chicago, a corporation,
appellee, Gen. No. 33,872, in which an opinion is this day
filed.

For the reasons stated in that opinion, the
judgment here is also reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.
O'Connor, J., dissents.

34103

JOHN E. LAW,
Appellee,

vs.

THE BRUNSWICK-BAKER-COLLIER CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2581A 608²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$2745.41, entered upon the verdict of a jury, which was returned by direction of the court.

The statement of claim was for a balance of \$4130.43 alleged to be due under a contract of employment to sell goods on a commission basis within a certain territory as agreed. The statement set up verbatum a contract between plaintiff and defendant made October 21, 1922, and alleged that plaintiff was continuously in the employment of defendant from the date of that contract until March 27, 1926. The statement set up in detail 136 orders for goods on which plaintiff claimed commission.

Defendant filed an affidavit of merits in which it admitted entering into the contract of October 21, 1922, as alleged, but denied that plaintiff "continuously remained in the employ of the defendant as per the terms of the written agreement down to and including March 27, 1926." The affidavit denied that plaintiff received 136 orders which were accepted as alleged in the statement of claim, but on the contrary averred "that the only orders received by plaintiff and accepted by defendant during said time were as follows:" Ninety-one orders, with the names of the customers, the amounts of the orders and dates of the same, from ~~January, 1923,~~ December 1925, to October, 1926, were then set up in detail. The affidavit continued, "That upon all of said orders as above set forth, defendant has paid

plaintiff the commission provided for in their said agreement."

At the close of all the evidence, plaintiff having admitted that he could not prove up any other orders, the court instructed the jury to return a verdict for the amount of commission due upon the 91 orders which it was admitted plaintiff obtained.

The sole contention of defendant is that the court erred in excluding material and competent evidence offered in its behalf.

Defendant first contends that the court erred in refusing to receive in evidence statements rendered tending to show (as it is claimed) that plaintiff had a drawing account of \$700 a month payable on the first and fifteenth of each month, and that his commissions were charged against said drawing account; that on the first day of each month he was sent a statement showing the payment to him, by way of drawing account, office expenses and charges back against commissions; that he was never paid on each particular job as it was closed, and that on March 1, 1926, as shown by one of these statements rendered, plaintiff's account was overdrawn in the sum of \$503.25.

Plaintiff contends that under the pleadings, by reason of rule 15 of the Municipal court, properly construed, the parties were restricted to the single question of whether commissions admitted to have been earned were in fact paid, and that upon this issue the evidence offered was not admissible. Defendant contends that the court cannot take judicial notice of the rules of the Municipal court, citing Seovill Mfg. Co. v. Cassidy, 275 Ill. 462, but the rule there announced has been since changed by the legislature (see Session Laws of Illinois, 1929, p. 466; Capital State Bank v. Larsen, 255 Ill. App. 479). We are therefore required to take judicial notice of rule 15, although the same is not made a part of the record.

Under that rule the issue between the parties, insofar

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as these 91 items were concerned, was limited solely to the question of whether the commission had been paid, and under that rule no issue was presented as to the contract under which plaintiff performed his services, since the affidavit of merits expressly averred that "defendant has paid plaintiff the commission provided for in their said agreement." A majority of the court, however, are of the opinion that under a proper construction of that rule as applied to the pleadings in this case, defendant could properly offer evidence tending to show that the account of plaintiff had been in fact overdrawn, and that payments had been made thereunder which should properly be applied to the satisfaction of sums due upon these 91 items. However, the burden of proof to show this fact was on defendant, and the proof offered was in our opinion wholly insufficient to show payment.

There was evidence tending to show that the statements offered by defendant in evidence were rendered to plaintiff during the course of his employment, the last of these statements being dated March 1, 1926. The uncontradicted evidence shows that defendant's employment ceased on March 27, 1926, thereafter, and that a substantial part of the items for which judgment was rendered against him, accrued after that time. This statement of March 1, 1926, is obscure as to the items to which it refers, and neither it nor the similar statements are intelligible as applied to the issue of payment raised by the pleadings. The proof offered fails to disclose that these statements are entitled to the dignity of an account stated between the parties with reference to the transactions which are the subject matter of this suit.

Moreover, the record discloses that this same defense was pleaded by defendant by way of off-set; that plaintiff's motion

to strike the off-set was denied and defendant ruled to file a bill of particulars; that after much delay the off-set was stricken because of defendant's failure to comply with that rule. It is apparent that defendant was not disposed to state with particularity the items making up the balance for which it claimed the right to a credit as payment. We hold the court did not err in excluding this evidence.

It is also urged that the court erred in excluding certain loose ledger sheets of the defendant company which were offered in evidence for the purpose of showing the status of plaintiff's account with the defendant company, and defendant contends, on the authority of Taliaferro v. Ives, 91 Ill. 247, and House v. Beak, 141 Ill. 293, that these ledger sheets were admissible as bearing on the question of payment. The preliminary proof, under well established rules, was insufficient to make these ledger sheets admissible for any purpose whatsoever. The uncontradicted evidence received showed that the items appearing on the papers offered were not original entries. The court did not err in excluding the same. Trainer v. German American Savings Loan & Bldg. Assoc., 204 Ill. 416; Sparks v. Rayburn, 190 Ill. App. 438.

There is no error in the record requiring a reversal, and the judgment is therefore affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

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[illegible]

34127

317

EDWARD J. YON and
OLIVER J. WOODWARD,
appellants,

v.

CITY OF CHICAGO,
a corporation,
appellee.

Appeal from Superior Court,
Cook County.

2531A. 608⁵.

MR. JUSTICE JOSEPH W. BURNETT
THE COURT OF APPEALS.

The question arising on this record is decided
in University of Chicago, a corporation, appellant, v.
City of Chicago, a corporation, appellee, Sen. No. 33,872,
in an opinion this day filed.

For the reasons stated in that opinion, the
judgment here is also reversed and the cause remanded.

WRITING OF THE COURT.

McSurely, J., concurs.
O'Connor, J., dissents.

34212

HAUS LEHMAN,
Plaintiff in Error,

vs.

GRACE HELEN LEHMAN,
Defendant in Error.

32 581.1.608
JANUARY 27 1908
JUDGE OF SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Complainant, Haus Lehman, filed a bill against his wife, Grace Helen Lehman, charging her with adultery and praying for a divorce. She answered denying the charges and filed a cross bill in which she charged complainant with habitual drunkenness, adultery and extreme and repeated cruelty. She also prayed for a divorce.

The cause was put at issue. The chancellor heard the evidence and found that the wife was without fault and that complainant had been guilty of habitual drunkenness for two years prior to the filing of the bill; that he was also guilty of extreme and repeated cruelty. A decree was entered dismissing the bill and granting Mrs. Lehman a divorce on her cross-bill and the custody of their three children - two daughters, one thirteen years of age, the other six, and a son ten years of age. The decree required complainant to pay alimony for the support of the family to the amount of \$30 a week and provided that defendant and her children should have the right to use and occupy the family dwelling in which they resided.

To reverse that decree this appeal has been perfected.

It is contended that complainant did not have the fair and impartial trial to which he was entitled under the law; that the court considered evidence which was not legally admitted; that the preponderance of the evidence does not support the decree, and that the decree does not follow the evidence.

1940-1941

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1942-1943

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1952-1953

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1956-1957

1958-1959

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1962-1963

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1974-1975

1976-1977

1978-1979

1980-1981

1982-1983

The most serious point urged (and we think the controlling one in the case) is whether complainant and cross-defendant was refused a fair and impartial trial by the court.

Complainant testified in support of his bill that on January 1, 1926, he found himself infected with a social disease and that he then accused his wife of adultery, which she denied. He further testified that he thereafter watched her and that on two occasions in the night time she went to 700-702 North State street in Chicago; that she there met a man who was afterwards identified as Earl Storey; that on one occasion defendant and Storey entered a room where the lights were burning; that complainant and some of his relatives who accompanied him saw them plainly; that the lights went out and that when they again came on defendant and Storey were seen in a compromising position.

In the course of the cross-examination, attorney for defendant produced a certain collection of papers, writings and pictures which appear in the record but which, for very good reasons, have not been abstracted. We shall not pollute the records of this court by a description of them. They are inconceivably vile and obscene. Complainant admitted that he kept these in a desk at his home. He stated by way of extenuation that he had picked them up when he was young. Some of them he said were novelties brought back by soldiers when they returned from France. He denied that he composed any of the obscene stories which appear in this collection but admitted that he kept them in an envelope and that he should have destroyed them. This collection was handed to the Judge, who asked defendant how he came to keep them. He said that he had gathered same when he was a boy fifteen, sixteen or seventeen years of age. The court then said:

"No man that has a sane mind would have this around him or ever see it. You needn't go any farther with this.

This man is unfit to associate with decent people. Absolutely unfit to associate with decent people. I do not care to see any more. This man is a degenerate, absolutely degenerate."

The court continued:

"And he comes in here and seeks to have the custody of these three little children, after having kept them in his home all these years. An insane mind, a degenerate mind. I do not want any more evidence on his bill. His bill will be dismissed. I won't spend any more time on it at all, or listen to this man or anything he says."

Counsel for complainant took an exception to the remarks of the court, but he did not offer to produce any other witnesses, whereupon the court said, "Go ahead on your cross-bill. Don't need any more evidence on that bill."

Mrs. Lehman then denied the truth of the testimony with reference to the two occasions on State street and gave evidence tending to show that complainant was a habitual drunkard; that he had been guilty of extreme and repeated cruelty, and that the disease with which he had become infected was not due to her fault. Her testimony was corroborated by other witnesses. Complainant then also produced other witnesses, and he also testified at length, the hearing extending over several sessions of the court.

At the close of the evidence the court summarized it and in a judicial way gave his reasons for the conclusions at which he had arrived both as to the bill and cross-bill, the principal thought in his mind being the welfare of the children. He stated he would assume that the relatives who went with complainant when he was watching defendant would testify to the same facts as did complainant.

While it is true that as to the conduct of the wife there is a conflict in the evidence, the Judge who saw and heard the witnesses had an advantage in weighing the testimony which this court does not possess. We cannot hold that the decree is against the manifest preponderance of the evidence. The exhibits which are attached to the record make it impossible for us to disapprove of

what otherwise might seem to be the harsh language of the chancellor. Another trial could not bring a different result. There is no material variance between the evidence and the decree, and the decree will therefore be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

34236

OUTDOOR LIGHTING SERVICE, INC.,
a Corporation,

Appellee.

vs.

HAROLD SLEENSKY,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2531-A-609

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of \$4321.67, entered upon the verdict of a jury, in an action upon a promissory note made by defendant May 9, 1926, which was by its terms due upon demand.

Defendant pleaded that the note was discharged by mutual settlement of accounts and that it was fully paid by delivering to plaintiff certain notes of one Fred A. Boggett and by the relinquishment of all claims concerning the same.

Of the points urged for reversal, it will be necessary to consider only one, namely, that the court erred in excluding evidence offered by defendant.

Defendant testified that in June, 1926, at a conference in his office with a Mr. Golinkin of the plaintiff company, defendant demanded payment of "the money for the Boggett mortgage for which I advanced the money;" that the amount of said mortgage was there computed and stated to be \$3800 with interest from 1926, making a total sum due thereon of approximately \$4,000; that Golinkin said, "I have a note of yours for \$4000. I will just call it even. The mortgage is about the same and the note is for \$4000;" that defendant said, "All right, that is all right with me. Have you got the note?"; that Golinkin said, "I will send Sloan up with the note."

Defendant further testified that Sloan was an employee of plaintiff; that the note was never delivered to him as

promised; that at a later time when asked for it, Golinkin told him the note had been mislaid and that when he, Golinkin, found it it would be returned.

This testimony of defendant was corroborated by another witness but was denied by Golinkin, thus making a clear issue of fact for the jury. The Doggett notes and mortgage were not produced.

Defendant further testified that at the time when the arrangement with plaintiff through Golinkin was made, the Doggett mortgage was in the possession of a lawyer named Assenthal, who was foreclosing it for plaintiff, but the court, on motion of plaintiff, struck out this testimony. The court then questioned defendant quite at length as to whether he wished to be understood to say that he gave Golinkin the Doggett mortgage when he did not have it in his possession or under his control. Defendant replied that he had turned the Doggett mortgage over to Golinkin before the note sued on was given, for the purpose of having the Doggett mortgage collected; that the Doggett mortgage was held by an attorney and that defendant had informed this attorney that he had no further interest in the Doggett mortgage whatsoever.

Upon redirect examination defendant was questioned by his attorney with reference to the circumstances under which the Doggett notes and mortgage were executed, but plaintiff objected, and the court sustained the objection. Further questions tending to show the circumstances and facts relating to the execution of the Doggett mortgage and notes and as to whether after the supposed conversation with Golinkin plaintiff had exercised the rights of ownership over the Doggett notes and mortgage, were upon objection by plaintiff excluded by the court. Even evidence tending to show that the plaintiff had received payments upon the Doggett mortgage and notes was excluded.

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Rosenthal, the attorney who, the uncontradicted evidence tended to show, had foreclosed the Doggett mortgage, was called as a witness by defendant and was asked questions as to whether Golinkin was present at the time the Doggett loan was made, by whom that loan was made, in whose possession this mortgage and notes were, and as to what he, the witness, had done with the same, and for whom he was acting with reference thereto after June, 1928, the attorney for defendant stating that he expected to prove that he, the witness, was acting for plaintiff in the case; but plaintiff's objections to all these questions were sustained by the court.

We think the court erred in excluding this evidence. The testimony for defendant tended to show that plaintiff in June, 1928, had taken the Doggett mortgage and other claims in full settlement of the note upon which suit was brought. There was a clear issue of fact for the jury upon that issue. The questions as to whether after that conversation plaintiff exercised acts of ownership with reference to the Doggett notes and mortgage, as well as evidence tending to show the circumstances under which the loan to Doggett was first made - concerned material facts necessary and proper for the consideration of the jury in arriving at its verdict on the issue presented.

For the error in excluding this evidence the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

34261

GEORGE SMITH,
Appellee,

vs.

FRANK ANDERSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

256 L 09²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, Frank Anderson, from a judgment in the sum of \$2500 entered upon the verdict of a jury, after motions for a new trial and in arrest had been overruled.

The action was in case, and Anderson and the Great Atlantic & Pacific Tea Company, a corporation, were originally made defendants thereto. The gist of the declaration was that on December 14, 1926, defendants assaulted and imprisoned plaintiff. Individual pleas of not guilty were filed, and the cause was afterwards dismissed as to the corporation.

Plaintiff then filed an amended declaration, to which Anderson alone was made defendant, and on the same day plaintiff brought a separate suit against the corporation, filing against it a declaration identical except as to the name of defendant. Both defendants filed pleas of not guilty, and on their motion these two suits were consolidated.

Upon the trial, at the close of plaintiff's evidence, the court on motion of defendant corporation, directed a verdict in its favor, which was returned and judgment entered thereon, from which no appeal has been prosecuted.

It is urged on behalf of defendant Anderson that the verdict and judgment are against the manifest weight of the evidence; that the court erred in denying his motion for a new trial, and that the damages allowed are excessive.

The conclusion we have reached makes another trial

necessary, and we shall not, therefore, undertake to express any opinion on the weight of the evidence except insofar as it may be necessary to a proper consideration of other points.

The case for plaintiff seems to rest on his own testimony, and there is slight, if any, corroboration of that testimony upon facts in dispute.

The detention of plaintiff, on account of which the action was brought, occurred on December 14, 1926. Plaintiff at that time was a resident of Chicago and was employed by an organization known as the "Samaritan Army," which operated a store at 1919 West Lake street, of which plaintiff was in charge. The business conducted was that of acquiring (sometimes by purchase) second-hand goods for distribution or re-sale on account of the "Army." Plaintiff was not satisfied with the quarters occupied on West Lake street and had been looking around for another place. For two years preceding December 14, 1926, he had lived at various places in the neighborhood of this store but was not able to state definitely just where such places were located or the duration of his residence at any particular place. On the morning in question, in search for a new location and accompanied by his wife, he paid a visit to the office of the real estate agency of Whiteside and Wentworth, located on Madison street some four or five blocks from this store.

He says he was dressed in rather shabby clothes; that he had not shaved nor taken any pains about washing; that he had been polishing shoes, and that he presented a general unkempt and dirty appearance; that for that reason upon arriving at the office of Whiteside and Wentworth, he directed his wife to go into the office and discuss the business with these real estate agents, while he waited in the street. Mrs. Smith went into the real estate office and shortly thereafter upon discovering that he had no cigar-

ettes, plaintiff walked to a nearby corner and entered a drugstore there for the purpose of making a purchase of these articles.

He says that while waiting to be served in the drugstore an officer tapped him on the shoulder and asked him what he was doing there; that he told him he was purchasing cigarettes; that the officer thereupon turned to defendant Anderson, who said, "There is your man." Plaintiff was then instructed to follow the officer, and he says that he told the officer that his wife was in the real estate office and asked permission to call her, which privilege was refused. He was told by the officer to get into an automobile parked near the drugstore, and he did so. The officer then drove the automobile to the Union Park station of the West Park and plaintiff says that defendant Anderson sat in the rear seat of this car with him; that on arriving at the Union Park station he was directed to enter and was detained there for an hour or so; that while there he protested his innocence and insisted that he be permitted to leave, which he was not allowed to do; that an hour or so after his arrival at this station he was directed to go with certain police officers and Anderson to the Desplaines street station; that he was there, again against his protestations, held until about eleven o'clock, p. m., the arrest having occurred at ten or eleven o'clock in the morning.

At the Desplaines street station he was required to appear, together with other persons held in custody there, for the purpose of identification, and an employee of the Great Atlantic & Pacific Tea Company, who was brought to the station by defendant, Anderson, appeared but failed to identify him as a person who had robbed certain stores owned and operated by that company. Plaintiff says this employee stated that the man who had committed that crime had already been arrested and convicted; that the officer then asked defendant Anderson if plaintiff should be further held, and that

Anderson said nothing and walked out of the room. Plaintiff also says that while he was held at the Union Park station, Anderson stated to the police there that he thought plaintiff was the man who had held up the store some time prior thereto belonging to the Tea company; that later at the Desplaines street station he was released; that after his arrest various people asked him when he again expected to rob an A. & P. Tea company store, and that shortly after his arrest he asked General Collins, the manager of the Samaritan army, to be relieved from his duties.

He was unable, on cross-examination, to give the names of any of the persons who had asked him about another expected robbery. He owned an automobile which was used in his business, but the license was taken out in the name of his wife. As a matter of fact, his discharge from the "Army" took place in May, 1937.

Plaintiff testifies that when he was arrested the officer asked defendant, "Is this the man you want?" to which defendant replied, "Yes;" that Anderson waited outside in the car while plaintiff was in the drugstore. He also says that he told the officer that his wife was waiting for him and that he knew a lawyer who was just across the street who could identify him; that the officer asked Anderson what he thought, and Anderson said, "Let's take him to the station," and also, "We can't be bothered." Plaintiff further says that the police said to Anderson, "We will take him over in your car," and Anderson said "All right;" that when they got to the police station Anderson took hold of him by the elbow and walked alongside of him, while the policeman walked back of them to the station. He had no conversation with defendant during the journey to the police station and defendant asked him no questions. He says that when they arrived at the station the desk sergeant asked defendant what the charge was, and defendant said plaintiff had been arrested for holding up an A. & P. store; that after Anderson

attempted to identify plaintiff at the Desplaines street station, the officer asked defendant if plaintiff should be released and that defendant said, "Not yet," and turned around and walked away.

Upon the motion for a new trial defendant submitted an affidavit of its attorney, who stated that he had exclusive charge in preparing the case for trial in behalf of defendant; that in the course of the cross-examination of plaintiff, plaintiff stated that Collins was not in the court room; that neither affiant nor defendant knew before the trial that Collins was plaintiff's employer; that affiant tried to produce Collins as a material witness but was unsuccessful in locating him, and that on examination after the trial Collins stated that Smith was not discharged at all but left the employment of Collins in order to engage in a more profitable business, but that Collins refused to make an affidavit to that effect; further, that during the course of the trial affiant made repeated and continuous attempts to find the police officer who arrested plaintiff, but was unable to do so, and that the police officer has since been located and an affidavit procured from him.

Ulysses E. Young makes an affidavit that he was an employee of the Great Atlantic & Pacific Tea Company at the time of the arrest; that during August, September, October and November, 1927, he was engaged in the matter of investigating and preparing the case for trial; that the attorney for defendant Anderson directed him to procure the name of the police officer who arrested plaintiff; that he went to the Union Park station for that purpose and there made inquiry but was informed by the officer there that they did not know; that he was informed by the officer in charge that an examination of all the records of that station failed to disclose any record or memorandum of the arrest of plaintiff and also failed to disclose who the officer was who made the arrest; that said officer in charge said that he thought that the arrest

must have been made by an officer of the Desplaines street station; that affiant investigated the books and records of the Union Park station, which he was informed by the officer in charge were all of the books and records covering the month of December, 1926; that there was no record or memorandum of the arrest of plaintiff; that thereafter he went to the Desplaines street station and made further inquiry of the officers there and was informed by an officer in charge that an examination of all the records failed to disclose that plaintiff had been arrested by any officer from that station or that he had been incarcerated there at the time in question; that subsequent thereto during September, 1927, he made further inquiry of a police officer stationed at or near Madison and Ogden avenues, who suggested to him that possibly Officer Thomas H. O'Brien made the arrest; that he located O'Brien, who was of the Desplaines street station, and O'Brien informed him that he had done so; that he relied upon this information but that within two weeks next preceding the trial O'Brien informed affiant that he was mistaken; that he had not made the arrest but had confused this incident with another arrest made about that time; that being so informed he with assistants again went to both police stations and made examination of all the records but was unable to find any record of the arrest of plaintiff and to learn therefrom the identity of the officer who arrested plaintiff; that upon the trial of the case affiant learned for the first time that the officer who arrested plaintiff owned and drove a Shroveton automobile, and that plaintiff after the arrest was transported to the Union Park station in said automobile; that immediately upon receipt of such information he again visited the Union Park station and was then for the first time able to ascertain that Officer Max F. Durachta made the arrest.

The statement of Young as to the misleading information given by Officer O'Brien is corroborated by an affidavit from that

officer, who stated that while he did arrest a man about December 14, 1936, for loitering about the premises of a Great Atlantic & Pacific Tea Company store under circumstances much similar to those described in the case of plaintiff and who he believed to be plaintiff, he afterwards ascertained that he was mistaken but did not so inform the attorney for defendant until November 16, 1939.

The affidavit of Officer Durachta was also submitted and states that he is the officer who made the arrest; that defendant Anderson did not request, demand or solicit the arrest of plaintiff, but it was done entirely on his own initiative, because plaintiff was a suspicious looking character. He also states that he ordered Anderson to accompany him to the station, and that at no time during the arrest or examination did Anderson place his hands on plaintiff nor in any way aid, cause or abet his arrest or incarceration.

There is no doubt of the materiality and importance of this testimony. Plaintiff, however, contends that the affidavits fail to disclose due diligence on the part of those who represented defendant in ascertaining these facts prior to the trial. It must be conceded that the affidavits do not disclose the highest degree of efficiency in the search for the police officer. Whether a new trial should be granted in such case must largely be determined by the discretion of the trial judge to the end that justice may be done as nearly as possible in all cases. The search for this police officer and this missing evidence was more diligent than efficient, and a more alert investigator probably would have discovered the evidence in time to have presented it upon the trial of the cause. However, courts of justice must follow reasonable rules. All investigators are not the most efficient. There appears to be no doubt that a search was made in good faith. Moreover, the case made out by plaintiff is practically uncorroborated, and the story he tells is in many respects

unreasonable and improbable. He has succeeded in getting a judgment for an amount which, in the opinion of this court, far exceeds any actual damage he has sustained. On his own testimony, we may not consider him wholly faultless in the circumstances which led to his arrest. There is no evidence tending to show malice on the part of defendant, and in the absence of malice only actual damages may be allowed. We cannot permit this judgment to stand for the amount of the verdict. With other cases, we have been cited by plaintiff to Biggel, Cooper & Co. v. Connor, 70 Ill. App. 116, and Traylor v. Montgomery Ward & Co., 153 Ill. App. 422, as tending to show that the damages allowed are not excessive. Those cases are easily distinguishable. The facts here do not justify the allowance of "smart" money, and the cases are not applicable.

To the end that substantial justice might be attained a new trial should have been granted. Gould v. Aurora, Plain & Chicago Ry. Co., 141 Ill. App. 344, and Jonest v. Aurora, Plain & Chicago Ry. Co., 177 Ill. App. 435, are in point. For the error of the court in denying the motion for a new trial, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

McConnor, J., specially concurring: I agree that the judgment should be reversed and the cause remanded on the sole ground that the judgment is excessive.

34298

COULTER LUMBER CO.,
a Corporation, Appellee,

vs.

HYMAN WEINBERG,
Appellant.

357
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

258 I.A. 609³

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$830.86 entered upon the finding of the court. The statement of claim discloses that the action against defendant was based upon a transaction by which on April 17, 1929, plaintiff sold and delivered to the H. M. LaPierre Company, a corporation, a carload of hard maple lumber of a value to the amount for which judgment was entered, and that plaintiff seeks to hold defendant liable as a guarantor of payment for this lumber.

The facts are practically undisputed. On February 16, 1929, defendant, who was the president of the Chicago Smelting & Refining Corporation of Chicago, wrote plaintiff at its office in Grand Rapids, Michigan, as follows:

"We have been advised by the H. M. LaPierre Co. of this city, that they are going to purchase a carload of Maple Lumber from you.

The writer is personally interested in the above concern, and will guarantee the account, so that you need not hesitate to enter into business negotiations with them.

If you desire any further information regarding them, we shall be more than glad to be able to be of any assistance to you.

Yours very truly,

Chicago Smelting & Refining
Corporation

(signed) H. Weinberg,
President."

After receiving this letter plaintiff sold and delivered to the H. M. LaPierre Company a carload of lumber, which was ordered in February, 1929, shipped by plaintiff March 9, 1929, and paid for in full on April 18, 1929.

On March 8, 1929, Mr. Holsman, vice-president of the

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plaintiff company, called at the office of the H. E. LaPierre Company and was given an order for another carload of lumber, an account of which plaintiff now sues. The order was given by H. A. Melvin, purchasing agent of the H. E. LaPierre Company, was in writing and stated:

"It is understood that this order, like the last order, is guaranteed by the Chicago Smelting and Refining Company this city."

An invoice for the lumber was delivered to the vendee by plaintiff, and several times payment was demanded but refused for lack of money wherewith to pay. Mr. Melvin at a later time stated that the writing did not really guarantee the payment for this car.

Two questions arise upon this record: First, does the letter of Feinberg of February 16, 1929, constitute a continuing guaranty of the account of H. E. LaPierre Company with the plaintiff company? And, second, if it is such a guaranty, is it a personal guaranty of Feinberg, the president, or that of the Chicago Smelting & Refining Corporation?

The trial court was apparently of the opinion that the writing constituted a continuing guaranty and that Feinberg, the president, was personally liable upon the guaranty. As against this view defendant urges that a contract of guaranty, like one of surety, should receive a strict construction; that the guarantor is bound to the extent and in the manner and under the circumstances pointed out in his obligation and no farther; that his liability is not to be extended by implication.

It is undoubtedly the general rule that a surety or a guarantor is a favorite of the law and has a right, generally speaking, to stand upon the strict terms of his obligation. However, the reason for that rule is that ordinarily the object or purpose of a person insuring or guaranteeing is to benefit his principal,

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and it has been thought that since he derives no benefit from the contract it should not be liberally construed so as to create an obligation by implication. The rule obviously fails where a surety or a guarantor assumes such obligation for a consideration paid or to be paid, and there seems to be no reason, under the latter circumstances, for the application of the rule of strict construction. The letter written by defendant in this case, fairly construed, conveys the idea of a consideration moving to himself. He says, "The writer is personally interested in the above concern," and the fair construction is that for that reason he undertakes to "guarantee the account." We think, therefore, that this contract should not be strictly construed but rather that the words and sentences should be given a fair and reasonable interpretation to the end that the intention of the parties may be ascertained and followed. Applying such rule of interpretation, was it the intention of defendant to guaranty the payment of more than one carload of lumber that might be purchased? If it means more than one, it would mean at least two, and might mean any number more than that. In other words, we seem to be driven to the conclusion either that it was the intention to guarantee the payment for only one carload or that it was the intention to guarantee the payment of any number of carloads, of any amount in value, and for any length of time. If such was the intention, why the statement that the writer had been advised that the LaPierre Company was "going to purchase a carload of maple lumber"? The words conveying the idea of liability are, "The writer ** will guarantee the account." The word "account," standing alone, might well convey the idea that there were to be several transactions, but it may just as reasonably be held to refer to a single transaction. The most liberal construction possible will enable us to say only that the language used is ambiguous. Moreover, the last sentence of the letter would seem to indicate that there was in the mind of

the writer the thought of a more definite arrangement for the future. For he stated that if further information was desired in regard to the LaPierre Company, "we shall be more than glad to be able to be of any assistance to you."

We find no oral evidence in the record which gives light on this ambiguity, and we think it is not held in any of the cases cited that a guarantor may be held liable where his liability rests on an ambiguous promise. We hold that the guaranty here was not continuous and unlimited but was for only one car of lumber.

Again, the signature to this writing, when construed in connection with its contents, compels a holding that the person guaranteeing is also ambiguous. The letter says that the "writer" is personally interested and that the writer will guarantee the account; but the name of the Chicago Smelting & Refining Corporation, as well as that of defendant, its president, is attached thereto. In view of the fact that the writing is that of the corporation, as well as of its president, it might not be unreasonable to hold that either one or both of them are liable, but since, as already stated, we are compelled to limit the guaranty to only one carload of lumber which has in fact been paid for, there can be no liability here as to either signer. The letter seems shrewdly written. It is possible that the ambiguities are by design, but even if they are, plaintiff's suit is not brought upon that theory.

For the reasons indicated the judgment must be reversed.

REVERSED.

O'Connor and McGursly, JJ., concur.

34309

GEORGE J. RATINGIANNIS,
Appellee,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS,
a Corporation,
Appellant.

CHICAGO, ILLINOIS

258 P.A. 0094

MR. PRESIDING JUSTICE RATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant bank, filing a statement of claim which, in substance, charged that plaintiff was a depositor in the bank of defendant's predecessor; that on September 20, 1928, he drew his check to the order of George F. Harding, County Treasurer, for the sum of \$1200; that defendant certified the check payable through the Chicago Clearing House; that the check was endorsed directing its payment to the National Bank of the Republic, Chicago, Illinois, or order by Robert M. Sweitzer, County Clerk and Clerk of the County Court of Cook County, Illinois; that on September 25, 1928, it was paid through the Chicago Clearing House.

The statement averred that defendant wrongfully refused to make payment of the said check to the payee named therein and wrongfully deducted the sum of \$1200 from the moneys on deposit in the name of plaintiff.

To this statement of claim plaintiff added the common counts.

Defendant filed an amended affidavit of merits claiming a defense to the whole demand; admitting the execution of the check, the endorsement and payment as alleged, but averring that plaintiff delivered the check "to his duly authorized agent, Dave Beyers, to pay certain real estate taxes in Cook county and that the manner in which the proceeds thereof were applied by the said Robert M. Sweitzer, Clerk of Cook county and Clerk of the County court of Cook county, was as directed and instructed by the said Dave Beyers."

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The affidavit of merits further alleged that Harding at the time of the transaction was the duly elected, qualified and acting Treasurer of Cook county, a municipal corporation; that Sweitzer during the same time was the duly elected, qualified and acting Clerk of Cook county and Clerk of the County court of said Cook county; that Sweitzer acting as said clerk deposited the check in the National Bank of the Republic, not in his personal account but in an account held for the benefit of Cook county; that said bank was then a duly authorized depository of Cook county, and that the proceeds of said check were thereafter withdrawn by the duly authorized fiscal officers of said County and used for County purposes.

The affidavit further averred that defendant had no knowledge of any facts relating to the check not appearing on its face; averred that defendant paid the same in good faith without notice of any defect, defense or irregularity of any kind whatsoever; denied that it wrongfully and unlawfully failed to make payment to Harding as County Treasurer or that it wrongfully or unlawfully deducted \$1300 from plaintiff's account; denied that it was indebted as alleged in the common count attached to plaintiff's statement, and denied that it was indebted to plaintiff in the sum of \$1200 "or in any sum whatsoever."

Plaintiff made a motion to strike this affidavit of merits, which the court sustained, and defendant electing to stand by the same an order of default was entered. Upon the evidence contained in the affidavit attached to plaintiff's claim, the court found that \$1300 was due to plaintiff and entered judgment against defendant for that sum.

The question for decision is whether the court erred in striking the affidavit of merits and in entering judgment.

The Negotiable Instrument law approved June 5, 1907, seems to be applicable. Section 42 of that act (Smith-Hurd's Ill.

Rev. Stat. 1929, §. 1954) provides:

"Where an instrument is drawn or endorsed to a person as 'Cashier' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the endorsement of the bank or corporation, or the endorsement of the officer."

While it has been held that the word corporation as used in this statute does not include cities and towns so as to confer authority upon a town treasurer to impose by his indorsement the liability of an indorser (Franklin Savings Bank v. Farrington, 212 Mass. 92, 98 N. E. 925), it has also been held by the same court that an instrument payable to the treasurer of the town of F., in legal effect stands on the same footing as if payable to the town itself, which is the real payee. Quincy Mutual Fire Insurance Company v. International Trust Co., 217 Mass. 370; 104 N. E. 345.

In this state Cook county by virtue of the statute is "a body politic and corporate." Smith-Hurd Ill. Rev. Stat. 1929, chap. 34, sec. 22, p. 609.

It is the view of the writer that section 42 of the Negotiable Instrument act is applicable; that the check was in legal effect payable to Cook county; that it is immaterial which fiscal officer indorsed the same. By virtue of statutory provisions Harding, County Treasurer, was also County Collector. His duty was to collect taxes on real estate which had not been sold or forfeited for non-payment of taxes. Sweitzer, the County Clerk, was an officer of the County, upon whom rested the duty to collect and receive moneys paid to redeem real estate from sale or forfeiture for non-payment of taxes, and it was immaterial upon whose indorsement the check was paid. In either case, the fund was transferred according to the intention of the drawer to the County treasury.

The majority of the court, however, are of the opinion that the affidavit of merits is defective in that it fails to aver

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that the check was used to pay taxes as intended by the maker, and there is no allegation that plaintiff owed Cook county for anything but the taxes, so that plaintiff got nothing for the \$1200. We are, however, agreed that upon the undisputed facts appearing from the pleadings, plaintiff is not entitled to more than nominal damages, and for the reason that Cook County has \$1500 of plaintiff's money and it is therefore estopped to collect the \$1200 taxes owed by plaintiff, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

34085

EDNA WITHERSTINE, Administratrix
of the Estate of Howard H.
Witherstine, Deceased,
Appellant,

vs.

CARL LINDHOLM, BELS LINDHOLM
and AUGUSTA LINDHOLM,
Appellees.

377
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25811 609⁵

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order vacating and setting aside a judgment for \$10,000 against defendants upon a motion in the nature of a writ of error coram nobis under section 89 of the Practice act.

The pleadings and judgment may properly be considered by us without a bill of exceptions, as the essentials of such proceedings are the same as they were at common law. Jacobson v. Ashkinage, 337 Ill. 141; Marabia v. Thompson Hospital, 309 Ill. 147; Welley v. Klein, 257 Ill. App. 171.

The original judgment against defendants was entered by Judge Lindsay of the Superior court on January 25, 1929, in an action brought by plaintiff to recover compensation for the alleged wrongful death of her husband. Defendants filed an appearance by an attorney, but when the cause was reached for trial in regular course they were defaulted for failure to plead and the cause was referred to a jury, which assessed plaintiff's damages at the sum of \$10,000, and judgment for this amount was entered. May 22, 1929, which was four terms after the judgment term, defendants filed their motion supported by an affidavit to vacate this judgment. Plaintiff filed a general and special demurrer to the motion, which demurrer was overruled by Judge Hugo Pan and by order entered

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December 3, 1929, the motion was allowed and the judgment vacated. This appeal followed.

The affidavit of defendants Sels and Augusta Liedholm alleges the negligence of their attorney in failing to file a plea, as ruled by the court, that they had a good defense upon the merits, in that the automobile which collided with plaintiff's intestate was the sole property of their son, Carl, over the age of twenty-one years, who was driving the car upon his own undertaking, and that the affiants were not present at the time nor had any interest in the automobile nor in the operation thereof; that they are of Swedish descent, having little education and with no experience in suits at law; that a Mr. Krueger, their friend, recommended that affiants employ Andrew Mitchell as their attorney; that Mitchell was duly licensed to practice law in Illinois and had been practicing law in Chicago for several years prior thereto and was in good standing as a lawyer in Chicago; that Sels Liedholm called upon Mitchell and retained him to enter the appearance of all the defendants in said suit and to defend the same and then and there paid Mitchell \$25 as a retaining fee, and Mitchell assured affiants that he was competent to look after them and would do so; that Mitchell entered the appearance of all the defendants in said cause. The affidavit charges that he thereupon "started upon a course of wanton and reckless disregard of the rights of said defendants." The affidavit details at some length the interviews between defendants and Mitchell and also Mitchell's activities in their behalf in the pending suit. Demurrers were filed on behalf of defendants and additional counts to the declaration were filed by plaintiff. Rules on the defendants to plead to the declaration as amended were entered. Thereafter further demurrers to the declaration were filed on defendants' behalf and on June 23, 1928, the demurrers were overruled and defendants were ruled to plead to the

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The 1947-1948 season was the fourth of the three seasons.

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The 1950-1951 season was the seventh of the three seasons.

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The 1959-1960 season was the sixteenth of the three seasons.

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The 1961-1962 season was the eighteenth of the three seasons.

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The 1969-1970 season was the twenty-sixth of the three seasons.

The 1970-1971 season was the twenty-seventh of the three seasons.

The 1971-1972 season was the twenty-eighth of the three seasons.

The 1972-1973 season was the twenty-ninth of the three seasons.

amended declaration within thirty days. This rule expired July 23, 1928, "but in pursuance of said plan of reckless and wanton conduct in looking after the interests of the defendants in said cause, said Mitchell failed to plead pursuant to last mentioned rule," but subsequently presented a stipulation with plaintiff's attorney extending the time for defendants to plead or demur to and including August 15, 1928, but that "pursuant to said wanton and reckless course of conduct," Mitchell failed to file any pleadings on behalf of defendants. Subsequently the cause was placed upon the calendar of Hon. William J. Lindsay and on December 11, 1928, was on the first call before said Judge and at that time marked for trial and was actually placed on the trial call on or about December 14, 1928, and came on for trial January 25, 1929, before Judge Lindsay, at which time defendants, not being present nor any one representing them, were defaulted for failure to plead and the jury was called to assess the damages and judgment was entered accordingly. During all this time affiants made inquiry through their friend, Brueger, as to the status and progress of the case and Brueger reported that Mitchell had told him that the interests of defendants were being properly watched and represented. Affiants did not know that judgment had been entered against them until on or about March 3, 1929, when a deputy sheriff informed them he had an execution against them. They thereupon endeavored to communicate with Mitchell and at various times thereafter Mitchell promised to see that the judgment was vacated, but that latterly they had been unable to get in touch with him.

Under the facts properly pleaded in the motion and admitted by the decurrer, were defendants entitled to the relief authorized by section 50 of the Practice act? The purpose of this act has been frequently stated. Chapman v. North American Ins. Co.

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292 Ill. 179; Marabia v. Thompson Hospital, 309 Ill. 147; Smith v. Fargo, 307 Ill. 300; Damitski v. American Linseed Co., 221 Ill. 161; Baird & Warner, Inc. v. Noble, 250 Ill. App. 255; Walley v. Klein, 257 Ill. App. 171, and many other cases. Although earlier cases seem to confine the relief given by the statute to cases where there was a disability of the party to sue or defend or some misprision of the clerk, the scope of the statute has been extended to cases where through fraud, duress, or excusable mistake without negligence on the part of the defendant, an existing valid defense was not presented. In Jacobson v. Ashkinaze, 337 Ill. 141, it was held the motion should be allowed where there was an attempted substitution of attorneys for defendant without his knowledge or consent and a motion reinstating the cause was served upon such substituted attorney and that the lack of authority of such substituted attorney to accept service of notice was known to plaintiff and his attorney. It was held that, had the court known these facts the cause would not have been reinstated and judgment would not have been rendered. In Baird & Warner, Inc. v. Noble, 250 Ill. App. 255, it was held that the mental disability of the attorney retained by defendants to represent them, resulting in an ex parte judgment, came within the scope of section 89.

No such elements are present in the instant case. Mitchell was the attorney duly authorized to represent defendants; he was mentally competent and was not inactive in the cause. Defendants' case is predicated upon the negligence of the attorney in failing to file a plea on their behalf. Negligence of an attorney has never been held to be sufficient grounds, under section 89, for setting aside an ex parte judgment.

But defendants argue that by characterizing their attorney's negligence as reckless and wanton they are entitled to relief. Reckless and wanton negligence could only be material if

the plaintiff was a party thereto or knew of such conduct, or that in justice she should not be permitted knowingly to take advantage of the wilful wrong of defendants' attorney. Neither motion nor affidavit asserts that plaintiff was a party in any way whatever to this alleged negligence. In such a case the conduct of the attorney, whether unintentionally negligent or wilfully so, was the negligence of defendants. Much as we may sympathize with defendants, yet to set aside a judgment after term time upon the ground that the attorney was negligent, would create a dangerous rule tending to destroy the stability of judgments. Defendants may have a right of action against their attorney, but they are not entitled upon the showing made to have the judgment vacated.

For the reasons indicated the order of December 3, 1929, vacating and setting aside the judgment is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED. *W.H.K.*

Matchett, S. J., and O'Connor, J., concur.

34100

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JACK T. LOEFFEL,
Plaintiff in Error.

387
ERROR TO MUNICIPAL COURT
OF CHICAGO.

255 I.A. 610

MR. JUSTICE MASONRY DELIVERED THE OPINION OF THE COURT.

Defendant having been charged, on information, with violation of the Illinois Securities Law, sometimes called the Blue Sky Law, upon trial by the court ^{was} found guilty and sentenced to the House of Correction for thirty days and fined \$300.

A number of points are made as grounds for reversal. One is that of the irregularity of the judgment. The record reads: "It is considered and adjudged by the court that the defendant, Jack T. Loeffel, is guilty of the criminal offense of 'Illinois Securities Law' on said finding of guilty." The finding of the court upon which this judgment was entered was that the "defendant was guilty in manner and form as charged in the information." If defendant's argument is correct, the case could only be remanded for a proper judgment on the verdict. See v. The People, 215 Ill. 265; The People v. Murphy, 188 Ill. 144.

The judgment, however, must be reversed for the reason that the evidence fails to prove defendant guilty of the crime charged. The information in various counts charged that defendant sold 50 shares of capital stock of the Standard Oil Friction Burner Company to Jack Block. Block swore to the information. The evidence shows that Block and defendant had been friends for several years. Defendant was in the oil burner business and president of the Standard Oil Friction Burner Company and Block was secretary at the time of the transaction in question. Defendant had contracts to install oil burners in buildings but

the company needed cash and Block undertook to raise the required cash. Defendant offered to give him 50 shares of his own stock in the company if Block would raise \$2500. Block and defendant procured a loan of \$1,000 from James Curran and defendant, pursuant to his agreement, transferred 50 shares of his stock to Block, giving him a certificate for the same. Block testified that he paid \$145 for this stock but defendant testifies that no cash was paid for this; that the \$145 paid by Block was for an automobile and that this was paid several months before the stock was issued.

It is very doubtful if this transaction between the defendant and Block could be characterized as a sale of stock covered by the Securities act. In any event, a single isolated sale by a Bona fide owner is not covered by the Act. Section 8, paragraph 258, chapter 32 (Cahill's Illinois Statutes.)

It is argued for The People that there was also a sale to James Curran and therefore the evidence shows two sales. The evidence does not show a sale to Curran. He testified clearly that he made a loan to Block and the defendant, taking 50 shares of stock as collateral. We do not find anything in the statute in question which defines such a transaction as a sale.

It follows, therefore, that the transfer to Block was the only transaction which might be called a sale and, as such an isolated sale does not come under the operation of the statute, the charge against defendant was not proven.

For the reason above indicated the judgment is reversed.

REVERSED.

Batchett, F. J., and O'Leary, J., concur.

34105

HENKE-SCHMITZ, INC.,
Appellee,

vs.

JOHN SCHMITZ and MARIE SCHMITZ,
Appellants.

2531 A 610
34
F
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MCCURELY DELIVERED THE OPINION OF THE COURT.

After hearing on a bill and answer the chancellor entered a decree ordering the defendants to turn over and deliver to the complainant all books of account, check books, bank statements, cancelled checks, contracts, etc., or other matters and property pertaining to or owned by the complainant, and ordered that Marie Schmitz be restrained from sending out letters in the name of the complainant. By this appeal she seeks the reversal of this decree.

The only questions involved are those of fact, and after consideration of the evidence we are of the opinion that the chancellor properly entered the decree.

Henke-Schmitz, Inc., complainant, is an Illinois corporation, organized in May, 1928, with a capital of \$75,000, represented by 750 shares of common stock, par value \$100 per share. Only 400 shares were issued and paid for. Herbert Henke subscribed \$19,000 in payment of 190 shares; Ellsworth A. Martin subscribed the sum of \$1000 in payment of 10 shares; John Schmitz, one of the defendants, subscribed \$19,000 in payment of 190 shares, and Marie Schmitz, the other defendant, subscribed \$1000 in payment of 10 shares, but her stock was paid for by her husband, John Schmitz.

Henke and Schmitz had been partners in a mill and interior trim business under the name of John Schmitz Cabinet Co., and remained partners until April, 1929. While they were partners they organized the Henke-Schmitz corporation for the purpose of engaging in the contracting and construction business. The business of the

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corporation was carried on by Henke and John Schmitz, Marie Schmitz taking no part in the affairs of the corporation, although she was elected a director. The corporation's place of business was at 3032 North Oakley Avenue, Chicago, where the partnership business also was carried on. This was also the residence of the defendants.

May, 1929, Henke and Schmitz had a disagreement, as the result of which it was decided to dissolve the partnership and also the corporation. Accordingly on May 17, 1929, an agreement was entered into between the corporation and James W. Casey and Frederick C. Jones, attorneys, whereby Casey and Jones were to collect all the assets of the corporation, pay all liabilities and distribute what remained to the stockholders. For the purpose of carrying out this agreement all the assets of the corporation were delivered to Casey and Jones, Henke depositing his stock and Martin's stock with them, while John Schmitz deposited his certificate of stock and the certificate of stock of his wife, Marie. John Schmitz at that time said he was the owner of Marie Schmitz's stock.

Casey and Jones had some difficulty in carrying out the agreement and two bills were filed in the Superior court of Cook county by Henke, one for an accounting and dissolution of the partnership of Henke and Schmitz, and the other bill for the appointment of a receiver and dissolution of the corporation. In the case involving the corporation the court appointed a receiver and Casey and Jones turned over to the receiver all of the corporate assets, as well as all of the stock certificates which had been deposited with them.

September 23, 1929, Henke and Schmitz arrived at an agreement as to the partnership, whereby Henke relinquished all of his interest in the partnership, receiving therefor a certain amount of cash and all of the assets of the corporation, including the 190 shares of stock of John Schmitz and the 10 shares of stock of Marie

5

Schmitz. Mutual releases were executed and delivered and new certificates of stock in the corporation, representing the shares formerly owned by John Schmitz and the shares owned by Marie Schmitz, were executed by John Schmitz as secretary, and delivered to Henke. John Schmitz thereupon resigned as an officer and director. As the original certificates of stock were then in the hands of the receiver, it was not known whether they had been endorsed or not, and Jones, attorney for John Schmitz, agreed that he would have Marie Schmitz sign whatever papers were necessary, including her resignation as director, and an assignment of her certificate of stock if it had not already been assigned. John Schmitz also agreed to turn over and deliver to Henke the following Monday all the books, records, papers and property belonging to the corporation, and gave Henke a letter to that effect.

In the receivership proceedings an order was entered finding that Henke had acquired all of the capital stock of the corporation and was the sole owner thereof, and ordered the receiver to turn over all the corporate assets to him. This order was approved by Jones, acting as attorney for Schmitz and the corporation.

John Schmitz failed, however, to live up to this agreement and failed to deliver to Henke all the books, records, etc., of the corporation, claiming that they were in the possession of his wife Marie and that she refused to give them up. Marie also refused to resign as a director or to execute any papers to carry out the agreement, although she was fully aware of the agreement as Jones had explained the matter to her and had made an appointment with her in order to obtain her signature.

November 1, 1929, the address of the corporation was changed to 609 North Wells street, Chicago.

Marie Schmitz subsequently began sending letters in the name of the complainant to various people with whom complainant had done and still was doing business.

The chancellor was justified in concluding that John Schmitz was in fact the owner of the stock of his wife Marie, and also that there was deposited with Casey and Jones not only the stock of John Schmitz, duly endorsed, but also the certificate for the ten shares issued to Marie Schmitz, duly endorsed in blank. Subsequently, pursuant to the order of court, these certificates were turned over to the receiver of the corporation and remained in the possession of the receiver until the settlement had been made of the partnership affairs and the corporation affairs, when all of the certificates were delivered to Henke, pursuant to the order finding that he had acquired all of the capital stock of the corporation. For the purpose of carrying out this agreement two new stock certificates were issued, one for 190 shares in the name of John Schmitz, and the other for 10 shares in the name of Marie. These were to take the place of the two certificates which had originally been issued to him and his wife, and it was agreed, Marie being fully advised of the settlement, that these certificates would be assigned over to Henke. Harry G. Kershenson, an attorney, was active and in settling the corporation matters, had called upon Marie Schmitz and requested her signature, to which she replied, "All right, let me see the papers you want me to sign," and promised that if he subsequently called upon her she would sign the papers.

At no time since May, 1929, when the certificates were delivered to Jones and Casey, has Marie Schmitz been in possession of the certificate which stood in her name. She has taken no action of any kind to protect her right to the stock, and the evidence leads inevitably to the conclusion that the stock in fact belonged to her husband, John, and that this action on her part is intended simply to harass and embarrass the corporation. The chancellor very plainly, as indicated in his remarks, was of this opinion.

Defendants argue that the office of the corporation was not legally changed to 609 North Wells street, and that the law is that the books, etc., and records of a corporation shall be kept in its

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principal office, which defendants assert is still 3032 North Oakley avenue. The point is unimportant as far as defendants are concerned, as they have no interest in the corporation. The record shows, however, that the office was legally changed to 609 North Wells street, and a proper certificate filed with the Secretary of State to this effect. The requirements of the statute were complied with.

The findings of the decree and the relief granted are warranted by the evidence and the decree is affirmed.

AFFIRMED.

Ketchett, F. J., and O'Connor, J., concur.

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34127

MARGARET JOHNSON,
Appellee,

vs.

THE NATIONAL LIFE & ACCIDENT
INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

258 I.A. 610³

MR. JUSTICE MCGURLEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$321 entered upon the verdict of the jury in an action brought by plaintiff as the beneficiary in two insurance policies issued by defendant on the life of Ambrozine Anderson, one policy being for \$90 and the other for \$231.

Several points are presented by defendant as ground for reversal but none of them is of sufficient importance to compel a reversal except the point alleging the erroneous rulings of the court upon the admission of evidence.

The policies were issued in November, 1926, and contained a provision that they were conditioned upon the "sound health" of the applicant at the time the policies were issued. The defense was that at this time the insured was suffering from a tubercular condition and other serious ailments, which fact was known to her. There was some evidence tending to show that she had been a patient at the Cook county hospital for a time in 1926 prior to the date of the policies. The insured was taken to the Cook county hospital in May, 1927, where she died the following July. Dr. Speed, who examined the patient, testified that she was suffering from "multiple fistulous openings around the buttocks and the genitals, and a decayed bone in front" and that "there was a pus discharge coming out of several apertures." The doctor was asked to testify as to what the patient had told him concerning

her case, but objections were sustained, the court saying: "The rule is universal when a person is dead her lips are closed forever to deny anything that may be stated that they said." A Dr. Head attempted to give similar testimony as to what the patient had told the doctor concerning the history of her case but objections were sustained.

Such testimony was competent. The doctors were not parties in interest and should have been permitted to testify as to conversations with the insured touching her knowledge of her condition of health at the time the policies were issued. Peerin Cordage Co. v. Industrial Board, 284 Ill. 90, 93. This point is not controverted in plaintiff's brief.

For the reasons above indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

34136

FRITZ KRAL,
Appellant,

vs.

HARRY VASHELS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2561A 610⁴

MR. JUSTICE McCURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession on a lease for \$157.50. Upon motion the judgment was opened and defendant was allowed to defend. Defendant filed a claim of set-off, claiming damages by reason of the bursting of some pipes and the consequent damage to defendant's goods. Upon trial by a jury the issues were found against the plaintiff and defendant's set-off was allowed in the sum of \$844.92. From the judgment for this amount against plaintiff he appeals.

It is the rule in this state that in an action for rent, lessee's recovery for breach of covenant by the lessor must be by way of recoupment and is limited to the amount of plaintiff's claim. Muhens v. Hill, 213 Ill. 523; Wright v. Lattin, 30 Ill. 393; Leis v. Stafford, 284 Ill. 610. This is admitted by the defendant in his brief, but it is argued that this being a fourth class case, no written pleadings are required and the case is what the evidence makes it. This may be true as to the character of action but it does not change the rule just stated. The cases cited by defendant are not controlling. Most of the cases cited have to do with the form of the action in fourth class cases. In none of them do we find anything to indicate that the established rule with reference to recoupment in landlord and tenant cases has been changed. As was said in Leis v. Stafford, *supra*:

"The tenant has his option to resort to his remedy by recoupment when sued for rent, or he may maintain an independent action. If he resorts to recoupment, the rule in that case is that he can only recoup to the extent of the amount claimed for rent, but can not have judgment for any excess that his damages may exceed the rent due."

THE UNITED STATES OF AMERICA

OFFICE OF THE
ATTORNEY GENERAL
WASHINGTON, D. C.

MEMORANDUM

TO: THE ATTORNEY GENERAL

FROM: THE DEPARTMENT OF JUSTICE

SUBJECT: [Illegible]

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4. [Illegible]

Very respectfully,
[Illegible Signature]

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Section 47, chapter 110, Practice act, is not applicable.

Claims for unliquidated damages cannot be made by the lessee by way of set-off, as they were not connected with the demand for rent.

Peppera v. Reagar, 33 Ill. App. 19, and cases there cited. Also see

Truman v. Reiss, 175 Ill. App. 351.

The evidence showed a provision in the written lease that the lessor should at the commencement of this lease and as soon as possible make certain repairs including the placing of the plumbing in good condition; also there was evidence that the lessor did not repair the plumbing and that because of this the pipes broke causing a flow of water damaging the merchandise of the defendant.

Plaintiff argues that by the terms of the lease it is provided that the lessor should not be liable for damages occasioned by the breaking of plumbing. We do not think this clause protects the landlord against damages caused by his failure to keep his agreement to put the plumbing in good repair before the term of the lease commenced and before the tenant occupied the premises.

Complaint is made of the remarks of the trial Judge. The court inquired of plaintiff while testifying, "Do you know of anything clear in your own mind?" This is properly criticized as tending to ridicule the plaintiff before the jury. There were also improper remarks by counsel for defendant which should not occur at such trial.

We think the instruction to the jury which stated as a fact that the plaintiff had undertaken to put the plumbing in good working condition at the commencement of the lease, "but has failed and neglected to do so" should not have been given.

For the reasons indicated the judgment should not be permitted to stand, and it is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and O'Connor, J., concur.

34167

JEANETTE ECKSTEIN, a minor, by
Henry P. Eckstein, her next friend,
Appellee.

vs.

CHEURER TAXI CO.,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2531A 011

MR. JUSTICE McDERMOT DELIVERED THE OPINION OF THE COURT.

About 8:30 o'clock in the evening of October 31, 1927, Jeanette Eckstein (hereafter called plaintiff), then nearly sixteen years of age, was struck and injured by one of defendant's taxicabs. Upon suit for damages she had a verdict and judgment for \$5,000. Defendant appeals.

The accident happened in Chicago on Cicero avenue, which runs north and south, near Maypole avenue, an intersecting street running east and west. There are street car tracks on Cicero. Plaintiff was riding with her brother, Henry Eckstein, who was driving, and his wife in an automobile going south on Cicero avenue. They stopped near the west curb of the street approximately 200 feet north of Maypole. It was Halloween night and plaintiff left the automobile to cross over to the opposite or east side of Cicero avenue to buy some flashlight powder at a photographer's shop which, the brother testified, was about 175 feet north of the place where their automobile was standing. As she was near or crossing the northbound street car tracks, she was struck by defendant's taxicab, going north. Her right knee was injured.

The version of plaintiff, supported by the testimony of herself, her brother and his wife, was that plaintiff stopped between the street car tracks to permit a northbound touring car

to pass; that following it was defendant's cab which, just before it reached plaintiff, swerved to the northwest in an attempt to cut around the touring car on the left; that the cab struck plaintiff and threw her eight or ten feet in the air. Mr. Sokstein testified that after plaintiff was struck the cab continued for a distance of about 100 feet before it stopped. If plaintiff was struck by the front (as indicated by the evidence) of a rapidly moving cab going in a northwesterly direction, we would naturally expect that she would be thrown in that direction, but all of plaintiff's witnesses say that she was thrown to the east side of the street. Mrs. Sokstein testified that when plaintiff was struck she was relatively as near the east side of the street as the witness and her husband were to the west side of the street. As it is conceded that the automobile in which plaintiff had been riding was against the west curb, this would place plaintiff near the east curb when she was struck. Plaintiff herself testified that when she was struck she was right near the curb on the east side of the street.

The liability of defendant was predicated upon the sudden and unexpected swerving of defendant's cab to the left, striking plaintiff as she was standing between the street car tracks, but this is inconsistent with the testimony of plaintiff's witnesses that she was near the east side of the street when struck or that she was thrown to the east side of the street. It is difficult to understand how she was thrown towards the east by a car going northwesterly.

The passenger in defendant's cab testified that it was traveling in the street car tracks at the time of the accident and did not change its course but remained in the tracks; that just before plaintiff was hit it was traveling not more than 20 miles an hour, and the witness saw plaintiff run "blindly" across the

the first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer.

I walked towards the old stone building, its walls covered in ivy. The windows were small and square, some with flower boxes underneath. A sign above the entrance read "The Old Mill". I had heard about this place from my grandmother, who said it was a special spot where she used to go when she was a child. The air smelled of old wood and earth. I could hear the faint sound of water flowing in the distance, which I later learned was the mill's water wheel. The building was surrounded by a well-kept lawn, and there were a few trees scattered around. I felt a sense of peace and tranquility as I stood there, taking in the sights and sounds of this quiet corner of the world.

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street, not looking in any direction; that when the cab was about 15 feet from her the driver put on the brakes and the cab stopped just as she was struck. The taxicab driver testified substantially to the same effect. Their testimony was supported by at least three witnesses who either saw plaintiff struck or saw her immediately thereafter. All these witnesses say that after she was struck she was over on the east side of the street. They also deny that after she was struck she was thrown into the air or that the taxicab ran past her.

There were other inconsistencies and contradictions in the testimony on both sides. The case was tried in a confusing manner. Unimportant objections to testimony were constantly made, and there was so much talk by the respective lawyers that the jury could not possibly have had any clear conception as to how the accident happened. The trial Judge frequently admonished the attorneys and suggested that they refrain from talking at the same time. We are not content to let this judgment rest upon this record. Liability for negligence charged must be proven by the preponderance of the evidence; it is not sufficient to establish this to present a mass of inconsistent and contradictory testimony to a jury and ask it to speculate and guess as to the facts.

By the second count of the declaration plaintiff sought to allege that the injury was inflicted by the wilful and wanton driving of defendant's cab. The court verbally sustained defendant's motion to dismiss as to this count on the ground that the evidence did not tend to support it. This ruling was proper. However, when defendant tendered a written instruction that the jury should find the defendant not guilty as to the second count, the court marked the same "refused" and did not give it to the jury. We think the refusal to give this instruction was inconsistent with the prior ruling and erroneous.

It is argued that the court ruled improperly upon the admissibility of evidence. This probably is true to a certain extent. The record shows constant objections by both attorneys and much of the record is taken up with colloquies between court and the respective attorney. Most of the objections are trivial and only tended to confuse the jury. We make the same comment with reference to the remarks of both attorneys.

Complaint is made as to the ruling on instructions but the brief of defendant does not present this point so that it may receive proper consideration. The brief presents the matter thus: "The matter of instructions. Under this heading we group points XXI to XXIII of the brief." Then follows a running commentary upon a large number of instructions, referring to them by number only and with general and not specific criticisms. A typical criticism is: "There is no good reason why such an instruction should not be given to a jury considering this kind of a case." This is of no assistance to the court. Criticisms of instructions in the brief should copy the instruction and point out errors specifically.

Forty instructions were presented to the court. Many of them are long and involved. A skilled lawyer could arrive at an understanding of them only by intense and prolonged study. The decisive issue in this case was virtually one question of fact, and such a number and kind of instructions were not necessary. Upon a second trial they should be shorter and fewer in number.

It is stated that the verdict of \$2,000 is excessive, considering the character of plaintiff's injuries. This may be so but the matter is not argued in defendant's brief so that we can arrive at any well considered conclusion thereon.

We agree with counsel for plaintiff in his criticism of defendant's brief as disregarding Rule 19 of this court.

The case should be retried so as to present the facts as simply as possible to the jury and not as a contest in scoring points.

REFFUSED AND RECALLED.

Matchett, P. J., and O'Connor, J., concur.

34230

Y. BAPTISTE (otherwise known as
N. E. Nugerditchian),
Appellant,

vs.

VARTAN V. PEDIAN and ABRAHAM BEDROSIAN,
copartners doing business as Vartan
V. Pedian Company,
Appellants.

258 L.R. 111²

MR. JUSTICE McGUIRE DELIVERED THE OPINION OF THE COURT.

Plaintiff, an employee of defendants, brought suit for unpaid commissions on sales of rugs and upon trial had a verdict for \$926.22. From the judgment thereon defendants appeal.

This controversy raises only two questions of fact:

(1) Was plaintiff's compensation to be a commission of 20% on sales, as plaintiff testified, or a salary of \$25 a week, as defendant Bedrosian testified? (2) Was the judgment properly against both defendants?

As to the first point the jury could properly conclude that plaintiff, an experienced man in the rug business, was requested by defendants to take charge of their store in Oak Park, which by the death of Pedian's brother had been left without a salesman in charge; that it was agreed to pay plaintiff 20% on the amount of sales and he would be allowed to draw money on account from time to time to meet his emergency expenses; that he never drew from the firm the greater portions of his commissions as he and the defendant Bedrosian were cousins, and for this reason he did not press the payment of the commissions; subsequently he demanded payment three or four times but was told by Pedian to "try to get it if you can." Although there was testimony tending to dispute the terms of employment, yet the jury who saw and heard the witnesses adopted the plaintiff's version of the transaction, and we cannot say that this conclusion is manifestly against the weight of the evidence.

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It is argued that defendants are not jointly liable, that Bedrosian was not a partner of Padian, but Bedrosian himself testified that he had been associated with Padian in the rug business for six or seven years and that he was a partner for about six months before the case was tried. He also stated that in 1937 he was running the Oak Park store and was to get 50% of the profits after deducting all expenses. It was also in evidence that Padian was ill and totally incapacitated and had not been in the store for eight or nine months prior to the trial. Plaintiff testified that defendants' cards read, "Vartan V. Padian & Co. Oriental Rugs, 1137 Lake Street Oak Park, Ill.;" that Bedrosian gave him 10,000 of these cards with instructions to distribute them to customers. From this and other circumstances in the case the jury could properly believe that defendants were partners in the business.

We cannot say that the verdict is manifestly against the weight of the evidence, and the judgment is therefore affirmed.

ATTORNEYS.

Hatchett, P. J., and O'Connor, J., concur.

54238

JOHN C. ARMSTRONG and R. J. CONRAD,
Appellees,

vs.

WILLIAM BRIETZKE,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF CHICAGO.

253 L.A. 611³

MR. JUSTICE McCURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$3,000 entered upon the verdict of a jury upon the trial of a suit in which plaintiffs claimed that this amount of money had been left with the defendant by J. A. Benjamin to be paid to plaintiffs upon Benjamin's written order. The suit was originally brought against Brietzke and the Marquette Park State Bank, but upon trial by agreement the bank was dismissed and the cause proceeded against Brietzke alone.

The statement alleged that Benjamin was indebted to the plaintiffs for services in the sum of \$3,000, and that he had on deposit with the defendants this amount to be paid to plaintiffs upon his written order, and that such a written order was given and presented by plaintiffs to defendant with request to pay the sum mentioned, which was refused.

As there must be another trial, we shall refer only briefly to the facts. In 1926 Benjamin owned some 213 vacant lots in Chicago, known as the Ashburn property. Defendant was the president of the Marquette Park State Bank in 1926 and 1927, and in September, 1926, Armstrong and Conrad (hereafter called plaintiffs) called with Benjamin at the bank and tried to interest the bank in Benjamin's property. Brietzke told them that this property had already been submitted to them and that they could not handle it because the amount of money involved was too much. There were other interviews and finally it was proposed by defendant to Armstrong that if Arm-

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Dear Sirs:

I have the pleasure to acknowledge the receipt of your letter of the 28th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am sure that they will give it the attention it deserves.

I am, Sirs, very respectfully,
Yours truly,
[Signature]

Enclosed for your information are two copies of a letterhead memorandum (LHM) dated and captioned as above. The LHM is being furnished to you for your information and for your use in the event you should wish to refer to it in the future. It is not to be distributed outside your department.

Very truly,
[Signature]

strong could plan a plan low enough for him to consider they might form a syndicate to buy the lots, Armstrong and Benjamin to be members of this syndicate. Plaintiffs testified that Brietzke inquired of them what their interest in the matter was and was informed that they were expecting a \$3,000 commission. Ultimately, in February, 1927, the property was purchased by the syndicate, the members of which were Benjamin, Armstrong, a Mr. Utosh, a Mr. Heady and a Mr. Willard. The members of the syndicate were to contribute \$5,000 apiece, plaintiff Armstrong agreeing to contribute his share. However, Armstrong failed to do this and dropped out of the syndicate and his share was taken up by a Mr. Whiteman, who then became a member of the syndicate. Brietzke paid Benjamin for his interest in the syndicate.

Defendant testified that he had no money on deposit or under his control belonging to Benjamin; that on March 9, 1927, plaintiffs presented a notice in writing demanding the payment of \$3,000 alleged to have been left with defendant by Benjamin, but specifically denied that at this date he had any money or had under his control any funds belonging to Benjamin; that this was the first time that he knew that plaintiffs claimed any sum of money as commissions on the deal. This is disputed by plaintiffs.

As it is not disputed that defendant had in February, 1927, paid Benjamin in full for defendant's interest in the syndicate, it is highly improbable that defendant then had any money belonging to Benjamin to be paid to plaintiffs thereafter. Attached to plaintiff's demand presented on March 9, 1927, is what purports to be an order signed by Benjamin dated December 10, 1926, directed to the Marquette Park State Bank. There was no order from Benjamin on the defendant and, as already stated, the bank was dismissed from this suit by agreement.

There was also in evidence a contract dated November 20, 1926, signed by Armstrong and Benjamin, directed to Bristol as agent, requesting and employing defendant to make the necessary arrangements for the purchase of the property and giving defendant full authority to represent Benjamin and Armstrong in the transaction. This contract recites that defendant is to pass upon all transactions as to value, price or exchange of the property and "our interest in said property at all times shall only be in proportion to the certificate of indebtedness held." There was other and contradictory evidence introduced.

We think, however, that the record fails to show that defendant had in his possession the \$3,000 in question given him by Benjamin to be paid to plaintiffs, and fails to show any written order on defendant by Benjamin directing him to pay this sum to plaintiffs. These are essential allegations of plaintiffs' statement of claim and the evidence failed in this respect.

Defendant was asked as to whether the agreement of November 20, 1926, signed by Benjamin and Armstrong, was the only contract with reference to the matter. Objection to this was sustained by the court. We think the witness should have been permitted to answer.

The court also improperly sustained an objection to defendant's Exhibit 3, which is a letter from Benjamin to Bristol, dated January 19, 1927, in which Benjamin stated that he had employed no agents whatever to negotiate the sale of his property nor any sub-agents. This letter was important as tending to support defendant's testimony that before the final settlement with Benjamin in February, 1927, he had procured a signed statement from him that there were no outstanding claims for commissions.

If this case is tried again, the testimony of Benjamin should be procured if possible.

We also think the instructions were misleading. The court instructed the jury that this was a suit brought on an agreement with Benjamin to pay the plaintiffs \$3,000 for the sale of his property and that Benjamin had on deposit in the ^{Bank} ~~Barqueting/Bank~~ under the control of the defendant the sum of \$3,000. This was a statement of facts to the jury about which there was conflicting evidence. Armstrong testified at one time that he was getting a \$3,000 commission from Benjamin if defendant was interested in the property and at another time testified that he was getting shares in the syndicate for his commission.

Defendant requested the court to instruct the jury, in substance, that even if they believed there was an agreement between plaintiffs and Benjamin whereby Benjamin was to pay the plaintiffs \$3,000 for their services and that defendant had money belonging to Benjamin in his possession and that defendant was notified, as alleged, on March 9, 1927, to pay such money to plaintiffs, yet if defendant before such notice had paid out all the money in his possession belonging to Benjamin to him and had received no notice before such paying, that defendant would not be liable to plaintiffs. This instruction was refused. As defendant had testified that he had settled in full with Benjamin in February, 1927, and never had any notice before March 9, 1927, that plaintiffs were claiming money as commissions, we think defendant was entitled to have this instruction given to the jury.

Plaintiffs' brief makes the point that the bill of exceptions shows no motion for new trial nor in arrest of judgment. Defendant has filed an additional record in this court showing that the bill of exceptions was properly corrected in this respect.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and O'Connor, J., concur.

17. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

34273

HARRY E. RABIN,
Appellee,

vs.

THE MIDLAND TAILORS, Inc.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

25814 6114

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming a balance due for wages on his contract of employment by defendant and upon trial had a verdict and judgment for \$948. Defendant appeals.

The question of fact presented to the jury for its determination was whether, as claimed by plaintiff, he was to be compensated at the rate of \$70 a week or, as claimed by defendant, at the rate of \$60 a week.

The jury could properly believe that plaintiff was first employed by defendant in May, 1921, as a salesman at a salary of \$40 a week; subsequently this was increased to \$50 a week. In January, 1927, the credit man of the defendant, who had been receiving \$160 a week for his services, was leaving its employ and the president of defendant company made the proposition to plaintiff that, if he would take on the duties of credit man in addition to his work in the sales department, defendant would pay him \$70 a week. Defendant's president also requested plaintiff not to collect the whole \$70 every week but to take \$60 a week, leaving \$10 to accumulate, to be paid at the end of the year. Plaintiff thereupon took over the position of credit man in addition to his work as salesman and retained both positions until July 27, 1929. At the end of the first year, when plaintiff asked for \$580 which represented the accumulations of \$10 a week, he was paid \$400 in instalments of \$100 a month. Defendant testified this

\$400 payment over and above \$60 a week was a bonus. It was in evidence that no other employee ever had received a bonus from defendant. The jury could properly believe plaintiff's version that this \$400 payment was not a bonus but was on account of the unpaid portion of the salary due him at the rate of \$70 a week. It was also in evidence that defendant characterized plaintiff as "the greenest and most inexperienced man" it ever had. The jury could conclude that it was highly improbable that the only employee to whom defendant would pay a bonus would be such an inexperienced man. The jury could also consider the fact that the credit man who preceded plaintiff in the position received \$100 a week and plaintiff was not only performing the duties of this position but also those of a salesman, so that it would be reasonable to expect that plaintiff would receive at least \$70 a week.

Plaintiff at one time loaned defendant \$1,000, and on October 30, 1928, defendant paid \$350 on account of this loan and also gave two extension notes, one for \$300 due six months later and the other for \$350 due one year after date, defendant receiving back its original \$1,000 note. Defendant offered in evidence its check dated July 28, 1929, for \$300 to the order of plaintiff, which bore an endorsement by plaintiff as follows: "\$300.00 Payment of Note and \$60.00 salary." The court sustained an objection to this. We think the court ruled improperly in this respect but do not consider that the error compels a reversal. The point sought to be made by defendant is that the endorsement amounted to an admission that plaintiff received \$60 as salary. This evidence was merely cumulative, as plaintiff testified that he had been paid at the rate of \$60 a week and was contending that there was a balance due him of \$10 a week. Even if the check had been admitted in evidence, the endorsement by plaintiff would have done no more than corroborate his testimony in this respect. It is not every error committed upon

the trial which requires a reversal.

The record as a whole amply justified the verdict returned by the jury, and indeed no other verdict could properly have been returned. The judgment, therefore, is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

34118

LOUISE WILSON,
Appellant,

vs.

FRANK E. WILSON,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25814.811⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Louise Wilson seeks to reverse an order entered by the Superior court of Cook county on November 1, 1929, by which the court refused to hold Frank E. Wilson in contempt of court for failing to pay alimony. For the purpose of this decision we shall assume that the order is an appealable one, as it has been treated by both parties in this court.

While the record is somewhat confused and the orders entered by the court are, to say the least, ambiguous, the facts are assumed by both counsel to be that in 1922 Frank E. Wilson filed a bill for divorce against his wife, Louise Wilson; that in 1923 she filed a cross-bill praying for a divorce on the ground of desertion. Neither of the bills nor the answers are in the record. On August 3rd an order was entered by which Frank E. Wilson was ordered to pay ten dollars weekly alimony pendente lite for the support of his wife and minor child, who was in the custody and control of the mother. It appears in the record that about a month later, September 12, 1923, an order was entered finding that Frank E. Wilson was in default in the payment of alimony in the sum of \$55, and he was adjudged to be in contempt of court for failure to pay this money and "for failure to respond to said Rule." An attachment was ordered issued. Four months later, November 1, 1927, an order was entered, "that the attachment of Frank E. Wilson be quashed and the said Frank E. Wilson be released from custody on the payment of the sum of Two Hundred (\$200.00)

Dollars in settlement of temporary back alimony, and in furtherance of agreement made by said parties hereto, it is ordered that Frank E. Wilson pay to Louise Wilson the sum of Twelve Dollars and Fifty Cents (\$12.50) on Monday of each week, the first payment being due on Nov. 7, 1927, until the further order of this court." On the same date Frank E. Wilson gave bond to the sheriff in the sum of \$2,000 conditioned that he would not depart from the jurisdiction of the court. About a year later, November 16, 1928, the divorce cause came on for hearing, complainant not appearing. The court heard the evidence, awarded Louise Wilson a divorce as prayed for in her cross-bill, and gave her the custody of the minor child, and it was decreed that Frank E. Wilson pay \$8.00 a week alimony for the support of the child, and also pay a dental bill of \$15 a month for services rendered by a dentist to the child, until the work should be completed. In the evidence taken on the divorce hearing, a certificate of which appears in the record, Louise Wilson testified that she and her husband had agreed that he was to pay \$8 a week for the support of the child and that it was also agreed that he would pay the dental bill above mentioned, and she further testified that she was satisfied with this arrangement and that she was not asking any alimony for herself.

About a year afterwards, November 12, 1929, a petition appears in the record which was filed by Louise Wilson Burke, and it seems to be assumed that she was the former defendant and cross-complainant. In this verified petition it is averred that in November, 1927, Frank E. Wilson paid \$360 "on back alimony then due," which was then about \$2,200; that there is still due \$1,885 for back alimony, which she has demanded of Frank E. Wilson, and that he has refused to pay it. On the same day that the petition was filed an order appears in the record by which the chancellor purports to find that Frank E. Wilson was in arrears more than

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\$2,000 back alimony. It was ordered that he be required to answer the petition and show cause why he should not be punished for contempt of court for refusing to pay the claimed alimony. Two days later Frank E. Wilson filed his answer, in which he set up that all of the back alimony had been settled upon payment of the \$200 November 1, 1927, as appeared from the order of the court above quoted. On the same day the order was entered which states that the matter came on for hearing on the petition and answer and the court denied the petition. This order is the one appealed from.

It seems rather anomalous for an order to be entered upon the filing of the petition in which a finding is made that the defendant is in arrears of more than \$2,000 in alimony, before he has answered the petition, and then two days later we find an order which is in effect that he is not in arrears at all. Obviously, the first order should not have been entered until a hearing was had.

We think it apparent from the record that when Frank E. Wilson paid the \$200 on November 1, 1927, by agreement, as the order states, it was in full of all alimony due up to that time. This is borne out not only by the record which we have above referred to, but by the decree of divorce, where no mention is made of any back alimony, and the complainant testified in her own behalf that an agreement had been entered between herself and her husband whereby she was not seeking any alimony; that he agreed to pay \$8 a week for the support of the child and to pay the dental bill. It is perfectly obvious that this claim for alimony is an afterthought and is entirely without merit.

The order of the Superior court of Cook county is affirmed.

AFFIRMED.

McBurely, P. J., and Hatchett, J., concur.

34130

JENNIE B. BENSON,
Appellee,

vs.

HARRY SALVAT, HENRY J. NEUNEISTER,
FARMIGN GARAGE COMPANY, a Corporation,
and FASHION AUTOMOBILE STATION, a
Corporation,
Appellants.

4 7 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

253 112

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession entered against the defendants for \$3911.80. The suit was for rent claimed to be due according to the terms of the written lease entered into between plaintiff as landlord and the defendants as tenants, at \$650 a month with interest and attorney's fees. On motion of the defendants the judgment was opened up and they were given leave to defend. They filed their affidavit of merits, and on a hearing before the court without a jury the judgment by confession was confirmed and the defendants appeal.

The facts, so far as it is necessary to state them, are that plaintiff as landlord leased to defendants as tenants certain premises which were being used by the defendants for garage purposes. The lease was assigned by the tenants on two different occasions to two different parties who conducted the garage for certain periods of time. The assignment of the lease by the tenants was consented to by the landlord. The two assignees of the lease fell behind in the payment of the rent and the premises were finally turned back to the original tenants, who re-occupied them and have since paid the rent as it fell due. The instant case was brought to recover rent which accrued while the assignees of the lease were in possession of the premises.

The defendants in their brief make but one point, and that is that there was an accord and satisfaction, as shown by the

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evidence, which was that they from time to time sent plaintiff checks for the rent with accompanying letters stating that the checks were in payment of the rent to date. It is stated, while the defendants make out one point in their brief, there are a number of points made in the argument contrary to Rule 19 of this court. Nor is counsel for plaintiff without fault in this respect. An examination of his brief discloses the fact that no attempt was made to follow Rule 19. We think it clear that there was no accord and satisfaction because there was no bona fide dispute between the parties as to the amount due. And unless there is such a bona fide dispute, the mailing of checks with letters as above stated, did not in law amount to an accord and satisfaction.

The defendants further contend that the judgment is wrong and should be reversed because when the assignees of the lease were conducting the garage the landlord extended the time of payment of the rent without the consent of the defendants; and it seems to be defendants' theory that when the lease was assigned the tenants in the lease became sureties for the assignees who were occupying the premises. No authority is cited to sustain this contention and we think it obvious none can be found. The lease expressly provided that the tenants might assign the lease upon the express condition that they remained liable for the prompt payment of the rent. There is no merit in the point made.

Defendants further contend the judgment is wrong because it was orally agreed between the parties after the lease had been assigned as above stated, and after the assignees were behind in the payment of the rent, that if the tenants would repossess themselves of the premises and pay the rent from that time on, plaintiff would waive the back rent due from the assignees of the lease. They offered evidence tending to show these facts, but the plaintiff offered evidence in direct opposition. And it is obvious that we

would not be warranted in holding that the finding of the court in favor of plaintiff was against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McDermely, J., concur.

34199

ILLINOIS CENTRAL RAILROAD CO.,
a Corporation,
Defendant in Error,
vs.
LOUIS FEINSTEIN, Doing Business
under the Name and Style of
L. Feinstein Co.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 612²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$385 claimed to be a balance due for freight, demurrage and other transportation charges in transporting a car of onions from Corpus Christi, Texas, via Chicago, to Detroit, Michigan. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$336 and the defendant appeals. Plaintiff has assigned cross-errors, claiming it was entitled to a judgment for the full amount of its claim.

The record discloses that on May 30, 1928, W. F. London owned a carload of onions and ordered them shipped from Corpus Christi, Texas, to himself at St. Louis, Mo., by the Texas-Mexican Railway Company, which on that date issued to him its bill of lading for the onions. On June 5th London ordered the car diverted to Horwitz Brothers, Chicago, and on that day the Texas Railway Co. at Corpus Christi issued to London its bill of lading to transport the car from Corpus Christi to Chicago via St. Louis. From St. Louis the car was transported by the Illinois Central Railroad Company.

In the bill of lading London directed the carrier not to make delivery of the onions without payment of freight and all other lawful charges. When the car reached Chicago Horwitz Bros., the consignees, on June 9, 1928, gave written instructions to the

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Illinois Central Railroad company at Chicago to deliver the shipment to the defendant, Feinstein, and on the same day Feinstein wrote the Illinois Central Railroad company at Chicago as follows: "Herewith delivery order on PVE car 9452 now on team track. Please divert same to Belock & Katz, Detroit, Michigan, via Michigan Central Ry. 18th Street Delivery. All charges to follow."

The car was diverted as per the written instructions by the Illinois Central R. R. Co. to the Michigan Central R.R., and transported to Detroit, where it arrived at 7 a. m., on June 11, 1925, and two hours later the consignees, Belock & Katz, were notified. Two days afterwards Belock & Katz refused to accept the onions and informed plaintiff of this. The rejection by the consignees of the onions was on the ground that the charges were higher than consignees had anticipated, and they suggested that plaintiff take the matter of the disposition of the onions up with defendant. On the next day, June 14th, plaintiff wired the defendant at Chicago, also sending a wire to the Texas-Mexican Ry. Co. at Corpus Christi, notifying defendant and the Railway company of the refusal of the consignees in Detroit to accept the onions and asking for instructions. June 15th plaintiff again wired defendant, informing him of the refusal and asking for instructions. Two days later plaintiff at Detroit wired Horwitz Bros., advising them of the situation, and on June 22nd plaintiff at Detroit wired London, the original consignor at Corpus Christi. All the telegrams were promptly received by the parties to whom they were sent but none of them made any reply or gave any instructions to plaintiff as to what it should do with the onions. June 25th, because the onions had deteriorated, plaintiff sold them at a fair sale and realized \$45. The car was partially unloaded June 25th and completely unloaded June 26th.

At the through freight rate the freight from Corpus Christi to Detroit amounted to \$360. The demurrage and other

charges amounted to \$70, making a total of \$430. From this was deducted the \$45 received from the sale of the onions, leaving \$385, the amount of plaintiff's claim. The court refused to allow demurrage after June 1st on the ground that the plaintiff Railroad should have sold the onions sooner. The charges accruing after that date amounted to \$45, which item was deducted from the \$385, leaving the amount for which judgment was entered - \$330.

The foregoing facts were stipulated. It was also stipulated that all of the carriers did all things required to be done by them, as provided by the schedules of tariffs in force and on file with the Interstate Commerce Commission and by the bills of lading and the diversion instructions given; and that the demurrage and truck storage charges were in full force and effect and applied to the shipment.

The defendant contends that there were two contracts for the shipment of the onions - one from Corpus Christi to Chicago, and the other, which was a new contract of shipment, from Chicago to Detroit; that the parties to the latter contract were not the parties to the first contract, and that therefore defendant was not liable for freight and other transportation charges from Corpus Christi to Chicago, but was liable only for the charges from Chicago to Detroit, amounting to \$82.50.

While, as stated by counsel for plaintiff, there has been some difference of opinion in this court as to whether a consignee who reconsigns a car and orders it diverted is liable for the freight and transportation charges to the point of diversion, yet, both parties in this case agree that where a consignee receives a shipment and orders it reconsigned and diverted to another destination, he is liable for all transportation charges. In these circumstances we shall, for the purpose of deciding this case, assume the law to be as contended for by both parties. In this view of the

law, obviously the defendant, having received the car in Chicago, was liable as consignee for all transportation charges that had accrued from Corpus Christi to Chicago, and since he ordered the car diverted to Detroit he was also liable as consignor for all transportation charges from Chicago to that city. The defendant having stipulated in the trial court that all of the ^{tariff} provisions were applicable, is not in a position to shift his position in this court, and, as he seeks to do, contend for the first time that the tariff provisions, as stipulated, are not controlling. It is elementary that the party cannot take one position in the trial court and afterwards change his position in a court of review.

We are also of the opinion that plaintiff has a right to assign cross-errors without objecting or excepting to the judgment of the trial court. McCreary v. Burnsmier, 293 Ill. 43. In that case the court said (p. 53): "The rule prevails in this State by reason of section 197 of the Practice act that an appellee may assign cross-errors in an appeal case without excepting to or appealing from the judgment or decree or any part thereof, where the decree or judgment appealed from is not severable." and we are further of the opinion that the court should have allowed plaintiff the full amount of its claim. The bill of lading provided that "the carrier may in its discretion" sell the property to prevent deterioration or further deterioration. This is discretionary with the carrier. But in any event the delay in selling the onions at Detroit was occasioned by the failure of the defendant to direct plaintiff what to do with the onions when he was notified by plaintiff that they had been rejected by the consignees at Detroit. The defendant, having made no reply to the telegram sent it by plaintiff for instruction, is in no position to complain that the sale should have been made sooner.

The judgment of the Municipal court of Chicago being

for too small an amount is reversed and judgment will be entered in this court in favor of the plaintiff and against the defendant for \$385, all court costs to be paid by the defendant.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

McSurely, P. J., and Matchett, J., concur.

34238

HYMAN FRISCHSTEIN,
Appellee,

vs.

HENRY H. HART,
Appellant.

Cook County.

2531 A. 612³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover a balance of \$3,137.75 and accrued interest, claimed to be the balance due on a note secured by a trust deed on real estate in Chicago. At the close of the plaintiff's case, defendant moved for a directed verdict, which was denied. He refused to put in any evidence, thereupon the plaintiff moved for a directed verdict in his favor, which motion was allowed and a directed verdict was accordingly rendered for \$3,473.00 in favor of the plaintiff and against the defendant. Judgment was entered on the verdict, and the defendant appealed.

Plaintiff's declaration consisted of a special count and the common counts. He attempted to attach an extension agreement entered into between plaintiff and defendant to his declaration and to make it a part thereof. On the trial plaintiff offered this extension agreement in evidence and a promissory note, also evidence to the effect that plaintiff had demanded of the defendant payment of certain installments due in accordance with the terms of the extension agreement and that payment had not been made, and that plaintiff had elected to declare the entire amount due.

It appears from the evidence that on May 2, 1927, Mayo

Friedberg made and executed his promissory note for \$15,800.00 which was secured by a trust deed on Chicago real estate and that the note and trust deed were owned by the plaintiff; that afterwards, the property was transferred by Friedberg to the defendant, Hart. On April 18, 1933, plaintiff and defendant entered into a written extension agreement whereby the execution and the note and trust deed were recited and that there was a balance due of \$5,137.75, which was a valid lien on the premises described in the trust deed. The extension agreement further recited that one of the principal notes secured by the trust deed became due and payable on May 2, 1933, and that it was owned by the plaintiff; that Hart, the defendant, was then the owner of the real estate described in the trust deed; that it was mutually agreed between plaintiff and defendant that the time of payment should be extended. Then follow installments showing when each would become due, all of which installments aggregate the amount then agreed to be due as a lien on the premises, namely, \$5,137.75. And by the terms of the agreement, Hart, the defendant, agreed to pay plaintiff, the legal holder of the note and trust deed, the balance remaining due and unpaid as the installments should fall due as extended. And it was further mutually agreed that all of the provisions and covenants of the note and trust deed should stand and remain unchanged except as to the time of payment; that in the event of failure on behalf of the defendant to pay the installments of principal or interest as they became due as extended, then the whole of the principal sum might, at the election of the legal holder, become due and payable at once, without notice.

The defendant contends that the special count in the declaration did not state a cause of action because under the common law system of pleading, a document cannot be attached to a

declaration and made a part of it by reference. This rule of law is admitted by plaintiff but plaintiff contends that the defendant is in no position to raise the point for the reason that the sufficiency of the declaration or the count cannot be tested on a motion to direct a verdict, even though it be fatally defective for the reason that the defendant by pleading to the merits admits the sufficiency and elects to proceed to the trial of an issue of fact. The rule of law is as stated by the plaintiff. Ell v. Risk, 191 Ill. App. 194; Witt & Co. v. Antkowiak, 192 Ill. 13; Slofaki v. W. A. S. Supply Co., 235 Ill. 146. The defendant, having filed the general issue and having made a motion for a directed verdict at the close of plaintiff's evidence, is not in a position to raise the question of the sufficiency of the special count.

The defendant further argues that the note and extension agreement were not admissible under the common counts. This contention cannot be sustained. The extension agreement under seal was signed by both parties. It stated the amount remaining unpaid on the promissory note secured by the trust deed. Defendant agreed to pay the amount in installments as provided in the extension agreement and further agreed that if the installments were not paid as they fell due, the whole might at plaintiff's election be declared to be due at once. Default having been made and plaintiff having elected to declare the balance due, nothing remained but to pay. In these circumstances, the common counts were sufficient. Those points are made by counsel for the defendant in their brief but they are entirely frivolous and without merit. There being no defense to plaintiff's action, the court took the only position that was warranted under the law by directing a verdict for the plaintiff.

The judgment of the Superior Court of Cook County is affirmed.

Matchett, W. J., and McDurely, J., concur.

AFFIRMED

34276

ATLAS COPPER & BRASS MANUFACTURING
COMPANY, a Corporation,
Appellee,

vs.

TRANS-CONTINENTAL FREIGHT COMPANY,
a Corporation,
Appellant.

APPEAL FROM THE
COURT OF
2581 A. 6124

MR. JUSTICE CLEGGON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$1788.78 claimed to be due plaintiff on the ground that defendant had forwarded a shipment of brass rods for plaintiff to Cuba, with directions to the defendant to collect the \$1788.78 before delivering the brass to the consignee in Cuba; but that defendant, contrary to the directions, delivered the brass without making the collection, that the consignee was financially irresponsible and the amount due plaintiff for the brass was wholly uncollectible from him. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of its claim, and defendant appeals.

The record discloses that the defendant was a general freight forwarder with offices in a number of the principal cities of the United States. Plaintiff was engaged in business in Chicago. In October 1926, Harry L. Woodruff, the president and general manager of plaintiff, sold the brass in question to a citizen of Cuba, and for the purpose of forwarding the shipment he took the matter up with Mr. Hendricks, the foreign traffic manager of the defendant at defendant's Chicago office; and the undisputed evidence is to the effect that Woodruff advised Hendricks of what plaintiff desired; that plaintiff was entirely unfamiliar with the method to be pursued in forwarding the shipment and making the collection and so advised the defendant through Mr. Hendricks, and the latter stated they would attend to the entire matter. Afterwards in November and December, plaintiff turned over to the defendant at its

THE UNITED STATES OF AMERICA
DOPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

OFFICE OF THE ASSISTANT SECRETARY
FOR LAND MANAGEMENT

MEMORANDUM FOR THE ASSISTANT SECRETARY
FOR LAND MANAGEMENT
FROM: [Name]
SUBJECT: [Subject]
[Text of memorandum body]

[Continuation of memorandum body text]

New York office two shipments, they were forwarded to Cuba and delivered to the consignee to whom plaintiff had sold the goods, without making collection.

Plaintiff's theory of the case is that it had instructed defendant to collect for the shipment before making delivery and that it failed to do so. On the other hand, the defendant's position is that it was instructed to deliver the goods to the purchaser in Cuba upon acceptance of 60 days drafts by him; that the drafts were accepted and the goods delivered, and defendant having followed the instruction given is not liable.

Counsel for defendant advance a number of propositions in their brief and argument as to why the judgment should be reversed, most of the contentions being questions of law. We are, however, clearly of the opinion that there is but one controlling question in the case to decide, and that is a question of fact as to whether the defendant carried out or violated instructions given by the plaintiff and whether the finding of the court in favor of the plaintiff is against the manifest weight of the evidence.

We have carefully considered all the evidence in the record and are of the opinion that it warranted the finding in favor of the plaintiff, and certain it is that we would not be warranted in holding that the finding in favor of the plaintiff was against the manifest weight of the evidence.

The evidence shows that plaintiff turned over to defendant two quantities of brass, one about November 14, 1923, which it had sold to the Cuban purchaser for \$1481.22, and the other about December 1, 1925, the invoice price of which was \$307.56, making a total of \$1788.78. On the trial it was stipulated by the parties that 60 day sight drafts for the invoice price of the brass were drawn by defendant upon Arnalix, the Cuban purchaser, attached to the bills of lading; that the defendant forwarded these documents to Cuba and

ordered them delivered to Arnaiz upon acceptance of the drafts by him; that he accepted the drafts, and bills of lading and shipments were thereupon turned over to him; that diligent efforts were made to collect the amounts due from Arnaiz but the "drafts were found to be wholly uncollectible." Woodruff, plaintiff's manager, gave testimony to the effect that in October or November, 1925, plaintiff, having sold the brass to Arnaiz, took the matter of the transportation of it up with Mr. Hendricks, its Chicago foreign traffic manager; that he told Mr. Hendricks he was unfamiliar with forwarding foreign shipments and that Arnaiz, the purchaser, was not financially responsible; that Hendricks said they would attend to the matter, that was their line of business; and in regard to the financial standing of Arnaiz Hendricks said, "Well, we can fix that all right by sending it down there on a sixty day sight draft," and that the brass would be kept in the warehouse in Cuba, and when Arnaiz accepted it he would have to pay the draft; that Woodruff stated the goods should not be turned over until they were paid for; that "I told him to collect the money, to be sure to collect the money before the goods were turned over to that man," and that Hendricks said, "Well, we won't let him have the goods until he pays for it."

The evidence is further to the effect that after the goods were forwarded plaintiff was inquiring of the defendant about the payment not having been made, and the testimony of Woodruff and Hendricks is in accord that both were of the opinion that the goods had not been delivered because the money had not been paid by Arnaiz and that they continued to be of this opinion for about a year after the goods had actually been delivered to Arnaiz.

Hendricks testified that Woodruff did not tell him how he wanted the shipment sent to Cuba. But he also testified, "He (Woodruff) wanted this shipment to go draft against documents. ** that he wanted this paid before the goods were delivered. Not those exact

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words, no sir. That was the inference drawn by me." He further testified that at a conversation between them before the goods were shipped, the question of collecting the money for the goods came up and that the witness explained the method of handling the business. And in reply to a question put to him as to whether he told Woodruff the method of shipment he answered, "Possibly not direct, but the conclusion we evidently reached was to draw a draft on the consignee. A sixty day sight draft or a sixty day draft in accordance with what the consignor wanted; it looked like sixty day D. P." And he explained that the letters "D. P." meant that the documents for the goods would be turned over to Arnais upon the payment of the invoice price.

A consideration of the testimony of these two witnesses leads us to the conclusion that it was the understanding of both that the goods were not to be turned over to Arnais until he paid for them. But the defendant contends that afterwards, in November or December when the goods were to be shipped, it requested plaintiff to give shipping directions and that the plaintiff told them to ship the goods on a sixty day sight draft, which defendant did, and that these directions were the final directions in the matter; that defendant followed them and that it is therefore not liable. H. M. Holden, employed by the defendant, testified that in November, 1925, he received a communication from defendant's New York office about the shipment in question, inquiring for shipping directions; that he didn't know a thing about the shipment until he got the communication from the New York office, and upon receipt of it he called up plaintiff and talked to Mr. Woodruff; that he couldn't recall exactly the telephone conversation but that afterwards he wrote a letter to plaintiff confirming the conversation. That letter is dated November 14th and contains the following: "Referring to telephone conversation of recent date in regard to shipment account H. D. Arnais,

Havana, Cuba, and in accordance with your instructions we are covering this shipment with insurance and collecting all transportation charges from the consignee, together with your invoice in the amount of \$1481.22 on 60 day sight draft and as soon as we receive payment of this draft we will remit this amount to you."

The evidence further shows that on December 1, 1925, plaintiff wrote the defendant in reference to the second shipment, the invoice price of which was \$307.56. It was directed for the attention of Mr. Holden, and said: "We are enclosing our invoice covering shipment to be forwarded by next boat leaving New York, N.Y. to R. D. Arnaiz, Jr. Will you kindly take care of all necessary export papers and make 60 day sight draft to collect for this invoice. This material is to be shipped to Sagua LaGrande, Cuba." Holden further testified that so far as he knew, defendant did not receive instructions, written or oral, to collect the shipment charges before making delivery.

The evidence further is to the effect that Hendricks and Holden, of the defendant company, did not communicate with each other as to what Woodruff had told them or what he had done in the matter before the goods were delivered to the consignee.

There is correspondence in the record between the parties showing that when plaintiff had not received payment for the goods, it requested the defendant to have them returned and defendant agreed to do so. This was long after the goods had been delivered to Arnaiz in Cuba, but apparently defendant's Chicago office did not know of this fact. As stated above, we are clearly of the opinion that upon a careful consideration of all the evidence in the record, we would not be warranted in disturbing the finding of the court in favor of the plaintiff on the ground that such finding is against the manifest weight of the evidence.

The defendant further contends that the judgment is wrong

and should be reversed because there was no competent proof of plaintiff's damages; that there was no evidence of the value of the brass in Cuba at the time it arrived there and that in the absence of such proof there was no evidence upon which the plaintiff's damages could be based, and a number of authorities are cited. Under the facts in the instant case, we think the contentions cannot be sustained. The evidence shows that plaintiff sold the goods to Arnais for the price of the invoice, which Arnais accepted; that it was a free and voluntary sale and in these circumstances the price is presumptive evidence of the value of the brass. Cloyes v. Plaatje, 231 Ill. App. 183; Travis v. Pierson, 43 Ill. App. 579; Johnson v. Canfield-Seligson, 293 Ill. 101; Starrs, Beckwith & Co. v. Meera-Slayton Lumber Co., 196 Ill. App. 287; Budd v. Van Orden, 33 N. J. Eq. 143; Wicks/Gunne-Mannaberry & Co. v. 319 Ill. 344; Byalog v. Matheson, 243 Ill. App. 50; same case affirmed 328 Ill. 269; Northwestern Transportation Co. v. McGarry, 66 Ill. 233, - a case cited by counsel for defendant, in which it was held that where goods were shipped and were lost or not delivered, the proper measure of damages is the value of the goods at the place of destination, which is the rule announced in all the cases. And that the price at which the goods (flour) in that case were sold was evidence of such market value. In that case the court said: "The only evidence touching the market value of the flour at the place of destination was the appellant's statement that he sold the flour to arrive, for \$700. Appellant insists that is no evidence of the market value of the flour, but we think it may be taken as evidence tending to show such market value."

Where, in an ordinary business transaction, personal property has been sold at a fair sale and nothing appears to cast suspicion on the transaction, it will be presumed that the reasonable value of the goods was the amount for which they were sold.

In the Johnson case, 292 Ill. 101, the Supreme court said (111-112): "The price actually paid at a bona fide sale of property

the value of which is in issue, is admissible to prove the value of such property. "Such proof is sufficient evidence of its value in the absence of other testimony." And in the Budd case, 33 N. J. Eq. 143, the highest court of New Jersey said (pp. 146-147): "The only absolute test we can have of the value of a merchantable article is what it has been sold for at a fair sale. All other means of ascertaining the value of a merchantable commodity are speculative, and must, to a greater or less extent, be uncertain. The sale is a demonstration of the fact, while estimates, even by the best judges, are simply matters of opinion, which, at best, are only approaches to the fact."

A further point is made that the instructions given by plaintiff to the defendant for forwarding of the goods were in writing and therefore it was error to admit oral evidence tending to vary such written instructions. We think it clear that all the evidence shows that the instructions were not in writing. This appears from the evidence offered on behalf of the defendant. Mr. Holden testified that he got the instructions over the telephone from Mr. Woodruff. We think all of the evidence, oral and written, was properly admitted and all of it should be considered in determining what the instructions were.

We have examined all of the contentions made by the defendant but think none of them would warrant us in disturbing the judgment.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

34294

SAMUEL H. ANSCHUTZ,
Appellant,
vs.
SIO. J. RICE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 LA 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

We have this day filed an opinion in this case on the appeal of plaintiff from the order of the court vacating the judgment in plaintiff's favor and against the defendant, where the facts are stated. Plaintiff filed an affidavit for garnishee summons; the summons was issued and served on the garnishee Continental Illinois Bank & Trust Co., a corporation. Afterwards, on December 11, 1939, the court, on motion of the defendant supported by a verified petition, vacated the judgment from which plaintiff appealed and which appeal has been disposed of in the opinion as above stated. On January 2, 1940, an order was entered on motion of the defendant discharging the garnishee bank. From this order plaintiff prayed and was allowed an appeal, which is the matter now before us. But one set of briefs is filed in the two cases and the brief filed by plaintiff has to do entirely with the vacation of the judgment. Nothing is said in the brief why the court erred in discharging the garnishee. After the defendant filed his brief in the consolidated cases, and although plaintiff had urged no reason why the order discharging the garnishee should be reversed, defendant made a point and argues that the order discharging the garnishee was proper. Plaintiff then filed his reply brief but there is no argument made in the reply why the order discharging the garnishee was improper. In these circumstances, of course, the order should be affirmed. It is not the duty of this court to search the record to find some reason to reverse the order or judgment of the trial court, and

the order is therefore affirmed.

We might say, as pointed out by counsel for defendant, that although the record discloses that the affidavit for the garnishee summons was sworn to on December 27, 1929, wherein plaintiff's agent swears that an execution had been issued on the judgment and returned "no property found," yet the return of the bailiff on the execution discloses the fact that it was not returned until December 30, 1929. In these circumstances, of course, the affidavit for garnishee summons did not furnish the basis for the issuance of the summons.

The order of the Municipal court of Chicago discharging the garnishee is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

34295

SAMUEL M. ANSCHELL,
Appellant,

vs.

SIG. J. RICE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2531A-613²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order of the Municipal court of Chicago entered December 31, 1929, by which a judgment of that court in favor of the plaintiff and against the defendant was vacated and set aside, the judgment having been entered on November 21, 1929. The judgment having been vacated and set aside more than 30 days after the judgment was entered, the court was without jurisdiction to vacate the judgment except under the provisions of section 21 of the Municipal Court Act, and it is under that section that the defendant contends he proceeded, and that the vacation of the judgment was warranted.

The basis for the order vacating the judgment was the verified petition made by an employee of counsel for defendant and the sufficiency of the petition is the only question before us; the plaintiff taking the position that the petition was deurrable and insufficient as a matter of law.

Plaintiff's suit was based on a promissory note signed by defendant and payable to plaintiff. The note is dated March 30, 1927, for \$2,000, and pays interest at 6 per cent from date. It is set up verbatim in plaintiff's statement of claim, and plaintiff alleges that there was due on the note \$1791.40 with interest.

The defendant filed an affidavit of merits in which he averred that he did not promise "in the manner and form as the Plaintiff" had alleged, and further averred that there was no consideration for the note and denied that he owed plaintiff anything.

There appears in the record affidavits under the statute, made on behalf of plaintiff to place the cause on the short cause calendar. We have but a precept record, and whether an order was entered striking the cause from the regular calendar and placing it on the short cause calendar does not appear, except that we find an order striking the cause from the short cause calendar.

But as stated, the sole question is the sufficiency of the petition filed by the defendant to vacate the judgment. The petition is made by an employee of counsel for defendant who swears that he had charge of the matter for defendant's counsel at the time the judgment was entered; that on the date the judgment was entered, the cause appeared for trial on one of the calendars of the Municipal Court Judge and that no one appeared on behalf of the defendant, "and a judgment was entered by default for the sum of Two Thousand (\$2,000.00) Dollars." This latter statement in the petition is contrary to the record, which shows the case was heard before a jury in the absence of the defendant. There was no default.

The petition further sets up that about June 13, 1929 Lekey Winer made oath that he was the authorized agent of plaintiff and that the cause would not take more than one hour; that the petitioner, the employee of counsel for defendant, verily believed that the cause was placed upon the short cause calendar but that after June 13th he met Winer and Winer told him that after filing the affidavit to short cause the case he had been informed that it would take more than an hour to try the case and that "he had secured an order continuing the cause generally to be taken up on notice to all parties;" that the petitioner relied upon this information and believed that Ward, counsel for defendant, would receive written notice when the case was to be called for trial, and that neither petitioner nor Ward received such notice.

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The petition further sets up that through no fault of the petitioner judgment was entered and that petitioner had "at all times exercised due diligence in watching said cause." Just what the petitioner did is not disclosed. The facts should have been set forth so that the court could determine whether or not diligence was used. If the records of the Municipal court had been examined, it is obvious that the petitioner would have known the status of the case, - whether it was on the short cause calendar or on the regular calendar. The petitioner further sets up that he was familiar with the merits and that the defendant had a meritorious defence, the substance of which is that on March 3, 1927, the defendant did not promise to pay plaintiff \$2,000 or any other sum and that the defendant did not deliver the note in suit to plaintiff; that he never received \$2,000 from the plaintiff; that he did not pay any part of the note to plaintiff but that on the contrary, defendant delivered the note to one Samuel Rabinoff, and at the time defendant stated to Rabinoff that plaintiff was not to have the note until the plaintiff had executed and delivered to the defendant a certain written agreement "setting forth the conditions upon which the note was to be given and the manner in which it was to be paid and when it was to be paid;" that defendant was a member of the Fort Dearborn Town Club; that plaintiff was also a member of the club and that Rabinoff was vice president of the club; that plaintiff was to dispose of the assets of the club and was "to guarantee in said agreement that the defendant would not be held liable on said note because the money which he was to derive from the sale of the personal property of said club, together with the outstanding accounts in various amounts due on said memberships, would pay for the indebtedness due others from the club, and that said agreement was to save him and to hold him harmless in the event that said Samuel H. Anschell (plaintiff) did not live up to the terms of the agreement upon

which the said note was delivered to Rabinoff." A reading of this part of the petition discloses the fact that it is meaningless. Just why defendant should have executed the note does not appear. Moreover, the averment is that the defendant had the oral agreement with Rabinoff and not with plaintiff. Obviously, the plaintiff in no way could be bound even if the agreement were clear and free from ambiguity, which it is not. The agreement as set forth in the petition is so ambiguous that we are not able to understand it.

The petition further sets up that Rabinoff delivered the note to plaintiff without authority and contrary to the agreement between the defendant and Rabinoff; that plaintiff fraudulently delivered the note to the Savings Bank and refused to execute the agreement; that plaintiff secured a chattel mortgage on the furniture of the club and subsequently foreclosed the chattel mortgage but had the property sold to himself through a dummy. Just what all this has to do with the case we are unable to understand. The petition further sets up that about April 30, 1927, defendant went on a trip to Europe. Before he did so he demanded "said note back from the said Rabinoff, and that the said Rabinoff assured the defendant that the agreement saving him free and harmless would be delivered to him before he sailed for Europe;" that the defendant again demanded the note and that Rabinoff, and Ansell, the plaintiff, both refused to deliver it back to him; that after the lapse of 90 days plaintiff requested defendant to sign a renewal note for \$2,000 payable to plaintiff's order but that defendant refused.

It is obvious that a reading of the petition discloses the fact that the petitioner was not free from negligence in watching the case in the Municipal court. It is also obvious that there is no defense on the merits shown and that the court was not authorized, under the law, to vacate and set aside the judgment. Counsel for the defendant says that "The order placing said cases on the

entered present jury calendar by Judge Schulman February 27, 1920, was the last order the defendant had a right to rely on and hence was exercising due diligence, having no legal notice that said cause was to be called for trial." We are unable to find such order in the record. The order entered by Judge Schulman on the day mentioned struck the cause "from the short cases calendar and ordered returned to foot of present Jury Calendar."

The order of the Municipal court of Chicago vacating the judgment of November 21, 1920, is reversed.

ORDER REVERSED.

Batchett, F. J., and McSurely, J., concur.

33951

VICTOR E. KRAJCI,
Defendant in Error,

v.

CARL BOECOTCH, CAROLINA BOECOTCH,
RAY SELLARS, FRANK WARSCHUS, DAN
TROFIMCHUK, EMANUEL FURMAN, MARIE
FURMAN, BEDRICH MINAR, individually
and as trustee, and ELLA V. BUTLER,
Plaintiffs in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

258 I.A. 613³

MR. PRESIDING JUSTICE SCANLAN
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendants Carl Boecotch and Carolina Boecotch seek to review a decree entered in the Circuit Court of Cook County. The bill prayed for foreclosure of a junior mortgage, on the premises known as 2732 East 16th Street, Chicago, Illinois, that secured notes executed by the defendants Carl Boecotch and Carolina Boecotch, in the sum of \$8,000. The bill alleges that the defendant Ella V. Butler was the holder of notes in the sum of \$800, secured by a second junior mortgage on said premises and signed by the said Boecotches, but she was not served with summons and was not dismissed out of the suit. The amended answer of Carl Boecotch and Carolina Boecotch, in effect, avers (inter alia) that Bedrich Minar and others conspired to swindle and defraud the said defendants out of their property and money and that, in furtherance of the conspiracy, they induced the said defendants, by false and fraudulent representations, to sign the trust deed and notes in question, the said defendants believing the said representations to be true. The answer also alleges that the signing by the said defendants of the said instruments was procured by duress. Defaults were taken against certain of the defendants and the cause was referred to a master in chancery, who made a report recommending that a decree of foreclosure

be entered in accordance with the prayer of the bill. The chancellor approved and confirmed the report of the master and entered a decree finding that there was due the complainant \$6,637.36, which amount included \$750 allowed the complainant for solicitor's fees, and the master's fees were fixed at \$234.70, and a sale of the premises was ordered. The report of sale stated that there was a deficit of \$1,261.85 and a deficiency decree was entered against the Descotechs for that amount. The complainant did not file a brief in this court.

The material facts in this case are clear and undisputed.

Carl Descotch and Carolina Descotch were foreign born and could read or write the English language only to a very limited extent. The master found that Carl Descotch "understood English poorly." Carolina Descotch gave her testimony through an interpreter. The master allowed certain leading questions to be put to Carl Descotch on the ground that it was hard to examine a man "with his intelligence." On April 29, 1925, Descotch and his wife owned a grocery store at 1414 Midgeland avenue, Berwyn, Illinois. They purchased it about two months prior to that time and the husband was conducting it. They had never offered the grocery store for sale and they did not desire to sell it. Descotch had been for thirteen years a packer for Sears, Roebuck & Company. The wife, at the time of the transaction in question and prior thereto, worked for the Western Electric Company. On the morning of the last mentioned date one William Balcar, a real estate broker, appeared at the grocery store. He was a stranger to Descotch. Balcar asked Descotch if he wanted to trade his grocery store for a two-story building situated at 2732 West 16th street; that if he had some money he could get the building at a great bargain; that it was owned by Hedrick Minar and Joseph Gruner; that they were brothers-in-law but that they could not get along together and they therefore desired to sell the property; that Gruner was formerly a tailor and desired to engage in the grocery business; that "the owner was kind of goofy and crazy;"

that they had paid \$14,500 for the building and had expended \$2,000 in improving it; that the building was worth \$18,000 but that Descoatch could get it for \$16,000; that the rent from the premises was about \$125 per month; that Descoatch would lose money in the grocery business. Balcar asked Descoatch how much money he had in the bank and the latter said that he had \$1,700. He told Descoatch to go at once and examine the property, but the latter said that he was busy in the store and that Balcar could bring his men to look at the store. Balcar left and returned several hours later in company with three real estate men, Bedrich Minar, James Minar and Joseph Gruner. Gruner stated to Descoatch that they had paid \$14,500 for the building and had expended \$2,000 in "improvements for the house" and that it was easily worth \$18,000; that he and his brother-in-law purchased it and lived in it but that they could not get along, and on that account they desired to sell the building. Both of the Minars took part in the conversation. Bedrich Minar told Descoatch the property "was worth easy \$18,000" and that if Descoatch could not sell it they would help him do so and that they would get him a bargain. They said that a bank owned the mortgage on the 16th street property. They finally induced Descoatch to get into Balcar's auto and they took him to the premises in question. On the way Gruner stated to Descoatch that they purchased the property two years before that time and that everything was in good condition and up to date; that he did not want to have anything further to do with his brother-in-law and wished to sell the property and split the money. When they arrived at the property the four so managed things that Descoatch saw but a small portion of the interior of the building. The two Minars, Gruner and Balcar insisted on closing the deal at once. Descoatch said that he would have to go home and "handle the store." They said: "We will take you back and you tell the girl to stay and

we will close the deal tonight," and they took Descotch back to his store and he told the girl to remain there. Bedrich Minar asked Descotch how much "cash money" he had and Descotch replied that he had \$1,700 in the bank. They said they wanted \$16,500 for the property and Descotch said he wanted \$4,500 for his grocery store. Descotch finally reduced his price to \$4,000 and the others reduced the price of the building to \$16,350. Bedrich Minar said: "Come on let's close the deal," and he took Descotch by the hand and Gruner by the hand and said: "Close the deal, see, and to get together." "I buy drink." Balcar stated to Descotch that "he was going to take me down to a lawyer, that he was going to make this deal. He was a pretty honest fellow, to see, and I could trust him;" that he was going to take him to the office of attorney Holub. Descotch said: "I don't know the man," and Balcar said: "well, you can trust him. Him good fellow and not cheat you. You can depend on him." The four men then took Descotch to the real estate and law office of Anthony J. Holub. Balcar officed with Holub and the latter had previously done business with Bedrich Minar. Descotch did not know Holub and had never met him. Then the parties arrived at Holub's office Bedrich Minar informed Holub that the parties had made a deal; that Carl Descotch was selling his store for \$4,000 and that Gruner was selling the building for \$16,350, and thereupon Descotch was induced to sign the following contract:

"This Memorandum Witnesseth, that Joseph Gruner and Ladislav Pospisil, hereby agree to sell, and Charlie Descotch agrees to purchase, at the price of sixteen thousand three hundred fifty dollars, the following described real estate, situated in Cook County, Illinois: two-story brick building, basement and attic, located 2734 East 18th Street.

Subject to (1) existing leases, expiring June, the purchaser to be entitled to the rents, if any, from the time of delivery of deed; (2) all taxes and assessments levied after the year 1926; (3) any unpaid special taxes or assessments levied for improvements not yet made; also subject to a first mortgage of \$8,000.00 due in about 33 months and subject to a second mortgage of \$5,000.00 payable \$75.00 a month and interest at the rate of 7% payable monthly on the balance from time to time unpaid, balance due in about 30 months. The said second mortgage to be executed by Charlie Descotch and wife, but no

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charge to be made therefor but expenses to be paid by Boscotch.

Said purchaser has paid Four Thousand Dollars represented by a Bill of Sale to Grocery store located at 1444 E. Ridgeland Ave. as earnest money, to be applied on said purchase when consummated and agrees to pay, within five days after the title has been examined and found good, the further sum of Twenty-three Hundred and Fifty Dollars at the office of E. Minar & Company, (Chicago, provided a good and sufficient Statutory Warranty Deed, conveying to said purchaser a good title to said premises with waiver and conveyance of any and all estates of homestead therein and all rights of dower to inchoate or otherwise (subject as aforesaid), shall then be ready for delivery, with interest at the rate of 8 per cent, per annum, payable semi-annually, to be secured by notes and mortgages, or trust deed, of even date herewith, on said premises, in the form ordinarily used by

A certificate of title issued by the Registrar of Titles of Cook County or a complete merchantable abstract of title, or a merchantable copy, brought down to date, or a merchantable title guarantee policy, to be furnished within a reasonable time. In case the title, upon examination, is found defective, within ten days after said Abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded and this contract is to become inoperative.

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor and this contract shall be and become null and void. Time is the essence of this contract, and of all the conditions thereof.

This contract and the said earnest money shall be held by E. Minar for the mutual benefit of the parties hereto.

In Testimony Whereof said parties hereto set their hands, this 28th day of April A. D. 1928.

Joseph Gruner,
Ladislav Pospisil,
Carl Boscotch,
Charlie Boscotch.

Parties of the first part to pay Balcar \$250.00.

Parties of the second part to pay Balcar \$200.00 as Real Estate Brokers Commission for making this sale."

then
While this contract purports to have been signed by Ladislav Pospisil, as a matter of fact the latter was not present at the time, nor did Boscotch see him at any time. It would appear that the contract was signed at that time by Gruner and Boscotch. Across the face of the contract appears the following in handwriting:

"This contract performed in full according to the conditions herein and to the satisfaction of all the parties each being paid each other in full, also commissions and the same is hereby cancelled.

Carl Boscotch
Joseph Gruner
William Balcar."

Holub then drafted a bill of sale that transferred the grocery store from Dosevitch to Gruner and he had Dosevitch sign this instrument. Dosevitch was then told that he should give the key to the store to Gruner right away, and Dosevitch did so. Dosevitch was then told to come to Holub's office on the following morning and bring the money. Then Balcar took Gruner and Dosevitch in his car to the grocery store and Gruner immediately took possession of the same and commenced selling goods. He stayed in the premises all night and the next morning sold goods again, and within a few days the premises were found to be vacant. Early in the morning of April 29, Balcar went to the grocery store and said to Dosevitch: "Come with me and get that money and finish that deal." Balcar then took Dosevitch to the bank where the latter had his money but the bank refused to allow the money to be withdrawn unless Mrs. Dosevitch signed the order. Balcar then took Dosevitch to the plant of the Western Electric Company and Mrs. Dosevitch was allowed to quit her work long enough to sign the order. It appears that the bank then issued two checks, one for \$1,500, payable to the order of Carl Dosevitch, and one for \$200, payable to the order of William Balcar. Balcar then took Dosevitch to Holub's office, where Dosevitch handed the checks to Holub, who handed the \$1,500 one to Hedrich Minar and the \$200 one to Balcar. Holub then had Dosevitch sign the trust deed and notes that form the basis of the instant proceedings. Holub then told Dosevitch to bring his wife to the office so that she might sign the notes and trust deed. Then Hedrich Minar told Dosevitch that he could move into the house at once. Dosevitch said: "You told me that the place was occupied," to which Minar replied: "A fellow moved out last night and that flat is empty so you can move in," and Hedrich Minar directed his brother Joseph to telephone a teamster, which was done, and Balcar then took Dosevitch back to the store and in a short time a teamster came and moved the Dosevitch

furniture to the 18th street property. When Desotch then examined the property he found water all over the premises and the pipes "all busted." He then went to Hedrich Miner and complained to him about the condition in which he found the property and Miner promised that he would "send a plumber to fix it." The \$1,500 check bears the indorsements of Carl Desotch and Hedrich Miner. The latter immediately deposited the same in his bank and the check was paid through the Clearing House on May 1, 1925. The \$2,000 check bears the indorsement of Wm. Balcer, who deposited the same to his account in his bank, and the check was paid through the Clearing House on April 30, 1925. Mrs. Desotch was at work at the time that the furniture was moved and she first saw the 18th street place when she returned from work that evening. She was taken to Holub's office that evening, where she was told to sign the notes and trust deed. Desotch told Holub that his wife did not want to sign the papers. Mrs. Desotch said that the house was not worth the money that they were to pay for it and that she did not want to sign the papers. She then "broke down and cried." Holub sent for Hedrich Miner. When the latter arrived he told Mrs. Desotch that it was no time for her to go back on the deal, that her husband had signed the papers and she must sign; that if she did not want to keep the house he would help her sell it; that they already had the store and that if she did not sign they would take away everything and chase her and her family into the street. Her husband then said to her: "I don't want to lose everything so you had better sign the papers." He then signed the notes and trust deed. As to what was then done with the notes and trust deed Holub testified: "I handed them to Mr. Gruner or Mr. Miner. They should have gone to Mr. Gruner. I don't remember if I handed it to Mr. Miner. I don't remember. I handed them to the gentlemen. Also the trust deed." Holub admitted that Mrs. Desotch did not want to

go through with the deal and that she wept bitterly. When asked as to what was said to Mrs. Desotch about their losing everything if she did not sign the notes, he answered: "That conversation I didn't hear. No, I was not there all the time they were. I went to the front part of the office three or four times while they were discussing the matter in my private office." It appears that all agreed at this meeting that the plumbing in the building had to be repaired. Mrs. Desotch said that they had no money with which to make any repairs, and, according to Holub, this matter "was finally disposed of by Miner taking a third mortgage and an assignment of rents." The warranty deed from Ladislav Pospisil to Carl Desotch and Carolina Desotch for the premises in question purports to have been signed by Pospisil on April 29, 1925, but Holub did not record that instrument until July 24, 1925. Holub testified that Pospisil was never present in Holub's office when either of the Desotches was there; that Pospisil signed the deed on the afternoon of April 29 or the morning of April 30, that he thinks it was on April 30 that "Mr. Miner came in with him with the deed;" that he kept the deed in his possession until the date it was recorded because he did not wish to record it until he "found the title to the premises to be merchantable." Holub further testified that he never saw an abstract until Sedrich Miner brought him one on May 8 or 9 and that it was then that he first examined the title to the premises. The hearing before the master took place in May, 1927, at which two prominent real estate experts, of wide experience, testified that the 18th street property was then worth no more than \$2,000 and that there had been no change in its value for two years. This testimony was not rebutted in any way. Ladislav Pospisil, the grantor in the deed, is a real estate salesman employed by Sedrich Miner. The master found that he was unable to determine when or how Pospisil acquired title to the premises in question. The Desotches never

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and a list of the names of the persons who have been engaged in the work.

The second part of the report deals with the financial situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and a list of the names of the persons who have been engaged in the work.

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met him and he took absolutely no part in the transaction in question save that his name appears as grantor in the deed. It is perfectly clear that he was a mere "dummy," holding the legal title for the benefit of the real owner, Bedrich Minar. Some of the circumstances that lead us to this conclusion are: On December 30, 1924, Alzbeta Jancik, a widow, conveyed the premises by a warranty deed to Bedrich Minar, for the sum of \$8,000; On December 31, 1924, Bedrich Minar executed a trust deed to secure the payment of one principal note in the sum of \$5,000, dated December 31, 1924, with certain interest notes; Bedrich Minar was named as trustee in each of the two junior mortgages made by the Descotches; rents were assigned to him; he explained the terms of the deal to Holub, the attorney; the contract between the parties provided that he should hold the same; the cash consideration was paid to him; he forced Carolina Descotch to sign the papers against her will; Holub says he turned over to him or Gruner the notes and trust deed as soon as they were signed by the Descotches, and Gruner was but an employee of Bedrich Minar; Holub testified: "Minar came in with him (Pospisil) with the deed;" when Carolina Descotch complained of the condition of the building and that the plumbing was leaky and that they had no money to make the repairs, Bedrich Minar agreed to make the repairs, and the amount that he claimed it would cost to make the same was charged against the Descotches in the settlement; it was Bedrich Minar who complained to Descotch that certain bills at the grocery store had not been paid and who forced the latter to pay him the amount of these bills, and who personally receipted to Descotch for the payments made by him in this matter; he was the dominant and controlling factor in the entire transaction.

The master justified his recommendation that a decree be entered in favor of the complainant upon the ground that he was "unable to find from the evidence, that there were any positive

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statements of present existing facts, or supposed facts, which were material in negotiating a contract, made by the parties to this cause or any of their agents, upon which Carl Descotch had a right to rely." Bedrich Minar and his agents and coconspirators represented to the Descotches that the owner of the 14th street property paid \$14,500 for it, and the undisputed evidence shows that Mrs. Jandaik conveyed the premises to Bedrich Minar for the sum of \$2,500. This was a misrepresentation of a present existing fact that was very material to the transaction, and as it was relied upon by the Descotches it constituted fraud sufficient to vitiate the transaction. (See Dunlap v. Peirce, 336 Ill. 276, 185.) Bedrich Minar and his agents and coconspirators also represented to the Descotches that the rental value of the premises was \$125 per month. They told Descotch that the premises "bring \$125 in rents" per month. The proof tends to show that the rental value was about \$75 per month. Bedrich Minar and his agents and coconspirators represented to the Descotches that the owner had expended \$2,500 in improving the premises after he had purchased them. The evidence tends to prove that the improvements made on the premises between the date of the purchase by Bedrich Minar and the date of the sale to the Descotches were of a negligible character.

The evidence clearly shows that Bedrich Minar and his agents, Balcar, Gruner and James Minar, conspired to cheat and defraud the Descotches by inducing them to enter into the contract in question, and it is equally clear that Holub, who became the attorney for the Descotches through one of the conspirators, Balcar, intentionally aided and abetted the conspiracy. No other attorney appeared in the transaction, and Holub claims he did not represent the seller. On April 23 Holub allowed Descotch to make a bill of sale of the grocery store and to turn over the key to the same to Gruner and permitted the latter, the employee of Bedrich Minar, to take immediate possession of

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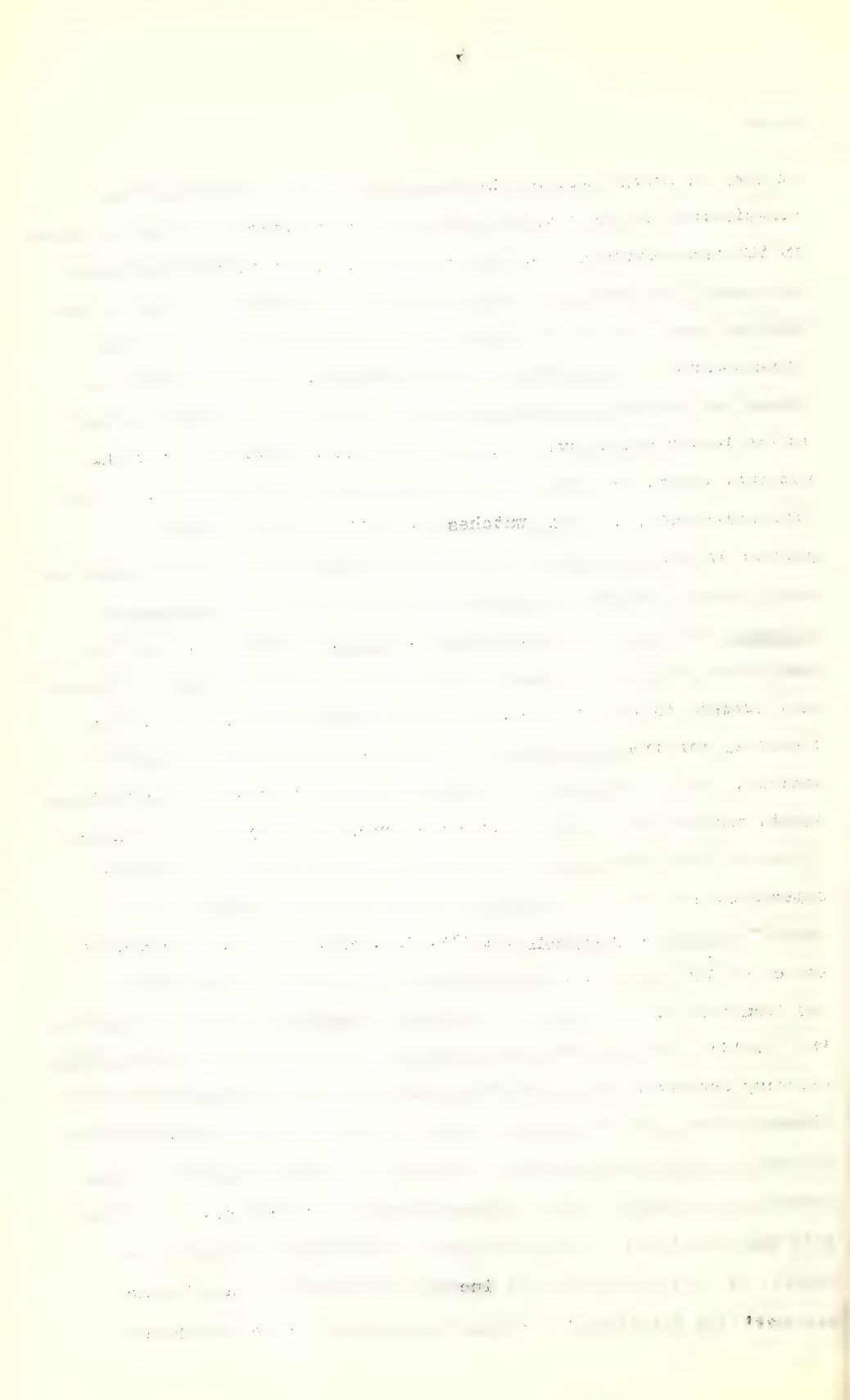
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the grocery. The next day he allowed Decatch to hand over to Bedrich Miner a check for \$1,500 and a check for \$500 to Balcar. At the same time he turned over to Bedrich Miner, or to his employee, Bruner, in the presence of Bedrich Miner, the trust deed and notes in question. When Mrs. Decatch told Holub that the property was not worth what they were paying for it and that she was unwilling to sign the notes and trust deed, and when she "broke down and cried," Holub sent for Bedrich Miner and Holub allowed the latter to coerce Mrs. Decatch into signing the notes and trust deed. Holub did not get an abstract to the property until about May 3 or 5 and he did not examine the title to the premises until then. He did not record the deed from Pospisil until July 24 and his explanation for this delay was that he held the deed until he found the title to the premises to be merchantable. The seller, apparently, did not think it necessary to have an attorney to represent him. Holub's conduct in the premises amounted to a betrayal of his clients. Bruner, who took possession of the grocery store, was but an employee of Bedrich Miner. Joseph Miner was a brother of Bedrich Miner. It is very significant in this case that, in spite of the character of the evidence introduced by the defendants, the only witness called by the complainant, save the two attorneys who testified as to the value of the legal services of the solicitor for the complainant, was Holub, and his evidence tends very strongly to support the theory of fact of the defendants. In the present case the acts and statements of any one of the conspirators were the acts and statements of all of the conspirators. The fact that there was a conspiracy to cheat and defraud the Decatches and the relationship which several of the conspirators bore to them, are very important elements in determining the merits of this case. Two of the conspirators, Holub and Balcar, occupied a fiduciary relationship to the Decatches and the other conspirators were fully aware of this relationship, and the conspirators contemplated that this relationship should

be used in furtherance of the conspiracy. It is plain that the conspirators arranged to have Holub act as attorney for the Descoteauxs in the transaction and to have Balcar act as the real estate agent for them. The fact that the relation of attorney and client existed between Holub and the Descoteauxs played an important part in the transaction. As has been frequently stated, "in the relation of client and attorney or solicitor, there is that confidence reposed in the latter which gives rise to very strong influences over the actions, rights and interests of the former. Hence the law, with a wise providence, not only watches over all the transactions of parties in this relation, but often interposes to declare transactions void, which, between other persons, could be good." (Jennings v. Maternal, 17 Ill. 146, 150; Gray v. Smith, 13 Ill. App. 43, 47.) Many other cases to the same effect might be cited. "Courts of equity have refused to set any bounds to the circumstances out of which a fiduciary relation may spring. It not only includes all legal relations, such as guardian and ward, attorney and client, principal and agent, and the like, but it extends to every possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other." (Hogg v. Peterson, 221 Ill. 532, 536.) Balcar pretended to act as the real estate agent for the Descoteauxs and he received pay from them for so acting. In Wink v. Myfarrow, 309 Ill. 571, 579, it is said: "The rule is well established in equity that the relation existing between a principal and agent for the sale of property is a fiduciary one, and the agent, in the exercise of good faith, is bound to keep his principal informed of all matters which may come to his knowledge pertaining to the subject matter of the agency. * * * The same man cannot act at the same time as agent for both seller and buyer. His duty to the one is inconsistent with his duty to the other.**" The principal has a right to rescind when he employs an



agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires and that he will remain in that situation. If, without the knowledge and consent of his principal, the agent becomes the agent of the opposite party as well and undertakes by contract to bind his original principal, the law deems the original principal in that transaction to be practically unrepresented, and any bargain in his name or not done on his account is usually voidable at his option."

"Where the vendor and vendee are dealing at arm's length with each other, the representations of the former as to the cost of his property, even though false and made with a view to deceive, will furnish no ground of action. * * * This rule, however, does not apply, where any fiduciary relation exists between the vendor and the vendee * * *. In such a case, a misrepresentation as to the price paid will give a right of action to the deceived party. Santa v. Palmer, 47 Ill. 98; Tuck v. Lanning, 76 id. 71; Plummer v. Sigdon, 78 id. 222; Morris v. Arbuckle, 81 id. 501." (Hank v. Bresnell, 120 Ill. 121. See also Griffith v. Burke, 165 Ill. App. 337, 343; Hess v. Phillips, 214 Ill. App. 339, 393-4.) In the latter case the court holds, following other Illinois decisions, that one selling property has a right to puff its value and that the purchaser will rely on such puffing at his own risk and peril, but that this rule does not apply where a fiduciary relation exists between the parties. Bedrich Minar and other members of the conspiracy told the Dosevitches that the 16th street property was worth at least \$18,000, whereas the undisputed evidence shows that it was worth not over \$8,000. All of the parties who made these representations were real estate brokers and undoubtedly knew the real value of the premises. Bedrich Minar knew its actual value. The Dosevitches were not on equal terms with the conspirators

The first of these is the fact that the system is not self-sufficient. It is dependent on the outside world for many of its raw materials and for the capital it needs to expand. This is a serious weakness, especially in the long run. The second is that the system is not very flexible. It is based on a fixed set of rules and procedures, which makes it difficult to adapt to changing circumstances. The third is that the system is not very efficient. It wastes a great deal of resources in the process of producing goods and services. The fourth is that the system is not very equitable. It tends to concentrate wealth and power in the hands of a few people, while the majority of the population remains poor and powerless. The fifth is that the system is not very sustainable. It is based on the exploitation of natural resources, which are being used up at an alarming rate. The sixth is that the system is not very democratic. It is controlled by a small group of people, who are not accountable to the rest of the population. The seventh is that the system is not very peaceful. It is based on competition and conflict, which leads to wars and other forms of violence. The eighth is that the system is not very healthy. It is based on the consumption of goods and services, which leads to pollution and other environmental problems. The ninth is that the system is not very happy. It is based on the pursuit of material wealth, which leads to a loss of meaning and purpose in life. The tenth is that the system is not very wise. It is based on a narrow view of the world, which fails to take into account the needs and interests of all people.

and the representations by the latter as to the value of the property were a gross exaggeration, and those representations, together with other representations, all of which were relied upon by the beneficiaries, resulted in an unconscionable bargain, and under such circumstances equity will not hesitate to interfere in favor of the injured party. (See Heinrich v. Martin, 210 Ill. App. 3d, 93-4, and cases there cited. See also William v. Tiedelhoff, 119 Ill. 367, 373.)

We think there is force in the contention of the defendants that the execution of the trust deeds and notes by the defendant Carolina Besscott was obtained by duress.

The record does not disclose who the complainant Victor E. Krajci was or how he came into possession of the notes in question. In a suit to foreclose a lien against land the rights of the parties are governed by the law as administered in courts of equity, and not by the rules that would obtain in an action to recover judgment upon the note secured. Mortgages and trust deeds are not assignable at law, and any who purchase them take subject to the same defenses that existed between the original parties. (Berkhoff v. Remley, 234 Ill. 136; Smith v. Hignam, 210 Ill. App. 179, 184 & 185; Shen v. Hawkey, 232 Ill. App. 43, 47; Reacock v. Phillips, 247 Ill. 467, 473.)

In the instant case the uncontroverted facts show, first, that Hedrich Miner had only a \$3,000 equity in the 16th street property, and, second, that the defendants turned over to Hedrich Miner or his agents and accomplices, property and money to the value of \$5,700, and they signed notes secured by the second and third trust deeds in the amount of \$5,690. By the deeds they not only lost all their interest in the real property, but they are held personally liable for the amount of the deficiency, \$1,261.86.

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The circumstances surrounding the transaction in question should shock the conscience of a court of equity, and equity could be weak indeed if it permitted. In the present proceedings, a foreclosure decree against the unfortunate defendants Carl and Carolina Donacotch.

The decree of the Circuit Court of Cook County is reversed, and the cause is remanded with directions to dismiss the bill for want of equity.

REVEREND JUDGE OF THE CIRCUIT COURT OF COOK COUNTY.

Gridley and Barnes, JJ., concur.



34131

LOUIS B. HARRIS,
Appellee,

v.

C. W. SCHUPPENHAUER,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY,

258 I.A. 613⁴

MR. PRESIDING JUSTICE SCANLAN
DELIVERED THE OPINION OF THE COURT.

Before a justice of the peace, Louis B. Harris, plaintiff, obtained a judgment against C. W. Schuppenhauer, defendant, in the amount of \$179.34. Defendant appealed and the case ^{was} tried de novo in the Circuit Court before the court, with a jury. At the conclusion of all the evidence the court instructed the jury to find a verdict in favor of plaintiff in the sum of \$179.34. Judgment was entered on the verdict and defendant has appealed.

Plaintiff sued to recover certain payments claimed to be due upon a written contract wherein plaintiff agreed to convey a certain lot in a certain subdivision to defendant upon the latter's paying for the same \$1,500 in certain installments. It was stipulated that there was due, under the terms of the contract, the amount of \$179.34. The contract provided (inter alia) as follows:

"5. All improvements made by the party of the first part, such as streets, community wells, piers, parks, foot-bridges and channels, shall be made at the sole expense of the party of the first part, and no assessments for any improvements made by the party of the first part shall be levied against the property conveyed to the party of the second part.

- (a) The party of the first part reserves the use of the community beaches, streets, wells, piers, parks, bridges and channels for the benefit of all property hereafter acquired by him as additions to said Round Lake Beach Subdivision, and for the benefit of all owners of lots in said additions to Round Lake Beach Subdivision.
- (b) In the event that the party of the first part grants an easement over a proposed channel to be located

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The second part of the report deals with the specific details of the country's development. It is a very detailed and thorough study of the country's development.

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between Blocks 32, 33 and 34, leading from Round Lake to the proposed golf course, lying East and adjacent to said Round Lake Beach Subdivision, then said easement shall also be for the benefit of all owners of lots in said Round Lake Beach Subdivision, and all lots shall be subject to said easement."

It has been rather difficult to determine from the brief of defendant the exact points upon which he depends. His position is fairly well cleared up, however, in his reply brief. His major contention is that under the aforesaid provisions of the contract plaintiff was obligated to build a channel and that plaintiff failed in that regard, and that therefore he could not recover in this suit. The only breach of the contract by plaintiff that defendant claimed upon the trial related to the channel. It is a sufficient answer to defendant's contention to say that the provisions in the contract, upon which he relies, do not obligate plaintiff to build or construct a channel. Defendant raises several other contentions, but as they are based upon the assumption that plaintiff, in the written contract, agreed to build a channel it is unnecessary to further consider the same.

The trial court ruled properly in instructing the jury to find for the plaintiff, and the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.

34140

L. STAHL,
Appellee,

v.

THE CHICAGO CUSTOM
GARMENT COMPANY, Inc.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

258 I.A. 613⁵

MR. JUSTICE JUSTICE DELIVERED THE OPINION OF THE COURT.

L. Stahl, plaintiff, sued The Chicago Custom Garment Company, Inc., defendant, in the Municipal Court of Chicago in an action of the first class. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against the defendant and assessing plaintiff's damages at the sum of \$4,500. Judgment was entered upon the verdict and the defendant has appealed.

The plaintiff was a clothing salesman and the defendant was engaged in the clothing business. The plaintiff was employed by the defendant under a certain written agreement called a "salary agreement" and he entered upon his duties as a salesman under the said agreement. The term of the employment was from January 1, 1923, until December 31, 1926. The plaintiff claimed that he fulfilled all his obligations under the contract until August 1, 1925, and that he thereafter held himself in readiness and was entirely willing to fulfill, complete and carry out all the terms of the contract by him to be performed, but that the defendant, on August 1, 1925, committed a breach of the contract by discharging the plaintiff without just cause. The plaintiff claimed that there was due him from the defendant, after allowing to the latter all its just credits and set-offs the sum of \$3,198.76. The defendant, in its affidavit of merits, sets up a number of defenses to the claim of the plaintiff.

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but in the view that we have taken of this appeal it is necessary for us to consider one only. The defendant denies that the plaintiff fulfilled all his obligations under the contract until August 1, 1936, and avers that he habitually neglected his duty as a salesman and through acts of omission and commission, and neglect, so injured the business of the defendant that the latter was compelled to discharge the plaintiff on August 1, 1936, and the defendant denies that it was indebted to the plaintiff in any sum whatsoever.

The defendant contends, and strenuously argues, that the preponderance of the evidence shows that the plaintiff's dismissal was warranted. We have carefully examined all the evidence that bears upon the instant contention and we are satisfied that the contention is a meritorious one. In view of the fact that this case may be tried again, we purposely refrain from analysing and commenting upon the evidence that bears upon the instant contention. In our judgment it would be a serious injustice to allow the present judgment to stand, and, therefore, it will be reversed and the cause remanded for a new trial.

REVEREND AND REMANDED.

Gridley and Barnes, JJ., concur.

34149

EDWARD J. RUG et al.,
Appellants,

v.

GRACE S. DUNCAN, GALUMET
CITY STATE BANK, a corporation,
ARTHUR JENNETTE, CHARLES H.
MILLER, DANIEL A. ROBERTS,
JOHN J. FLAHERTY and JOHN S.
HALAC,

Appellees.

APPEAL FROM JUDICIAL
COURT, COOK COUNTY.

258 L.A. 614

PRESIDING

MR. JUSTICE SCAGLIAR DELIVERED THE OPINION OF THE COURT.

Edward J. Rug et al. filed a bill of complaint in the Superior Court of Cook County against Grace S. Duncan, Galumet City State Bank, a corporation, Arthur Jennette, Charles H. Miller, Daniel A. Roberts and John J. Flaherty. Later, by order of court, John S. Halac was also made a defendant. The defendants Flaherty and Halac were defaulted for want of an appearance and answer. Defendants Duncan, Miller, Jennette, Galumet City State Bank and Roberts filed demurrers to the bill. The court sustained the demurrers of defendants Duncan, Miller, Jennette and Roberts and dismissed the bill as to these defendants. The demurrer of the Galumet City State Bank was overruled and it was ordered to answer the bill within ten days.

It appears from the record that the instant case is still pending in the lower court as to the defendants Flaherty, Halac and Galumet City State Bank. An order of court dismissing a bill as to part of defendants only is not a final one, and can not be appealed from until there has been a complete disposition of the cause as to all other parties. This is a well settled rule, as

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stated in Thompson v. Fellansbee, 56 Ill. 427, and followed in International Bank v. Jenkins, 109 Id. 212, Farsen v. Durham, 117 Id. 137, Chicago Steel Works v. Illinois Steel Co., 135 Id. 8, Bucklen v. City of Chicago, 160 Id. 411, and other cases." (Grever v. Golsy, 171 Ill. 434, 436.) "This court has frequently held that if a bill is dismissed as to one or more parties for want of equity and the case still remains pending as to other parties, the complainant cannot prosecute a writ of error until there has been a final decree or disposition of the case as to all the other parties. The reason is that such a decree is not a final decree within the meaning of our Practice Act, and this court has therefore no jurisdiction to review it. Under such circumstances this court will dismiss the writ of its own motion." (The People v. Banks, 235 Ill. 127, 129. See also C. & W. I. R. Co. v. City of Chicago, 294 Ill. 257, 261.)

This court, of its own motion, dismisses the present appeal.

APPEAL DISMISSED.

Gridley and Barnes, JJ., concur.

54171

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. LAURA MARTON,
Appellee,

v.

HARRY KOCH,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

253 I.A. 614²

MR. JUSTICE DELANEY DELIVERED THE OPINION OF THE COURT.

By leave of court, a complaint was filed in the Municipal Court, under Section 38 of the Municipal Court Act, in which the relatrix, Laura Marton, complained, under oath, that she was an unmarried woman and that she was "pregnant with child in said City of Chicago, which child by law would be deemed a bastard, and that Harry Koch * * * is the father of said child." The defendant filed a plea of not guilty to the charge and waived a trial by jury, and the cause was submitted to the court. After hearing the testimony the court found that "the relatrix was on the 8th day of October, 1929, delivered of a bastard child, born alive, and that he, Harry Koch, is the father of said child." A motion for a new trial was overruled and judgment was entered upon the finding. The defendant has appealed.

The defendant contends that the guilt of the defendant was not proven by a preponderance of the evidence. The defendant has not incorporated in the abstract of record any of the evidence heard upon the trial of this cause, and for that reason alone, under the rules of this court, we would be justified in affirming the judgment. However, we have read the entire evidence presented on the hearing and we are satisfied that the finding of the trial court was fully justified by the proof. In the order finding the

defendant guilty, as written up by the clerk, the name of the relatrix is given as "Mary Barton" and the defendant insists that in view of this state of the record the judgment should be reversed. The counsel concedes, as the record shows, that the real name of the relatrix is Laura Barton and that no such person as "Mary" Barton figured in the proof. It is perfectly clear that the word "Mary", in the order, was a clerical mistake. Counsel did not in any way raise the instant contention in the lower court, and he concedes that he discovered the present point by a careful examination of the record. The trial court has the right, at any time, to make the record speak the truth, and the present point is not one that calls for a reversal of the judgment.

We find no reversible error in the record and the judgment of the Municipal Court of Chicago is affirmed.

WYLLIE.

Wyllie and Rogers, JJ., concur.

34107

JOHN MANAK and MARTIN ORSHUR,
doing business as CALIFORNIA
PLATING WORKS,

Appellees.

v.

JULIUS ORONOWSKY, doing
business as ABILITY PLATING WORKS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

253 I.A. 814³

MR. JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

This is a suit begun by attachment, claiming an indebtedness of \$913.94. The attachment affidavit was traversed and defendant denied any indebtedness in excess of the sum of \$411.10. The case was tried without a jury, and resulted in the court's finding the issue on the attachment against the plaintiffs, and in their favor on the merits of the case, in the sum of \$725.95, for which the judgment appealed from was entered.

Defendant had an order from the Alomite Die Casting Company for plating certain cups in two sizes. Plaintiffs were procured to do the first process of nickel plating under the following circumstances.

August 19, 1929, while defendant was absent in New York, defendant's employee, one Taps, went to plaintiffs' office to get prices for the work. Taps was called as a witness for plaintiffs, and testified that while plaintiff Manak gave him prices of plating the two sizes of cups, and he offered a less price, the price was left open until defendant should return.

Manak and others in his office testified that he gave the prices as ten cents apiece for small cups, twenty for the large, and three and one-half cents each for rings, the prices at which he subsequently submitted his bills, and that on the following

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morning Teye accepted these terms by telephone. While Teye claimed he made no agreement as to prices and had no authority to, he nevertheless ordered and began making deliveries to plaintiffs the next day. When defendant returned to the city September 14, 1939, he had a conversation with Manak in the presence of his daughter and Teye. In the meantime nickel plating had been done on deliveries made to plaintiffs. The bills therefor were sent to defendant at plaintiffs' prices. Defendant's testimony in substance was that he told Manak he would pay him nine cents apiece on the small cups, ten cents on the large, and two and one-half cents on the rings, that Teye had no authority to make an arrangement for prices, that if plaintiffs wanted to accept defendant's price they might go ahead with the work, that Manak then said: "All right, let it go nine cents, ten cents and two and one-half cents;" that a check was then given to Manak for \$230; that Manak's statement of charges for work done from August 22 to August 31, inclusive, at the prices he claimed, was then changed in his presence by defendant's daughter to correspond to the figures defendant agreed to pay. His daughter and Teye also testified to such changes. Manak denied that there was any talk about change of prices, and defendant claimed that later when Manak called for his check he refused to accept defendant's prices as aforesaid, and that when he received bills at plaintiffs' prices he called up Manak and the latter told him to pay no attention to them, that the matter would be straightened out when the work was all done.

Defendant also testified that he was charged with work on 78 large cups and 648 small cups which were defective and not accepted by the Alomite Company, and that he was compelled to pay the Alomite Co. \$244.32 for 1618 cups that were spoiled in the plating, for both of which items he claimed credit. Defendant's daughter corroborated defendant as to said conversations and change

of statement of prices.

No question arises that defendant was entitled to a credit for a check of \$230.83 (including the check for \$200). But the evidence clearly discloses that the amount used for was the balance after giving such credit.

As to the claim of credit for \$844.32, the court appears to have allowed only \$192. We think defendant should have been credited with the entire amount. We also think that the evidence discloses that defendant was charged at plaintiffs' prices for work on 78 large cups and 649 small cups, amounting to \$78.90, which, the cups having been returned as spoiled, should have been credited to defendant.

Subtracting, therefore, from the claim of \$910.84, credits for \$244.32 and \$78.90, a total of \$324.22, the balance would be \$586.62, to which plaintiffs would be entitled if plaintiffs' prices were accepted.

Whether or not Tape was authorized to close an agreement at plaintiffs' prices, the evidence clearly tends to show, we think, that they were ratified by defendant. The bills submitted from time to time upon the basis of such prices were apparently accepted by defendant without protest. While there was contradictory evidence on that point the trial court evidently accepted plaintiffs' version and we cannot say the court erred.

Appellees filed cross-errors claiming the court improperly quashed the attachment writ. No proof was advanced on either side on that subject, and we think the court properly quashed the writ. Appellees' point that the court erred in permitting defendant to file his traverse after the filing of his general appearance had the effect of waiving any objection to the attachment and its writ.

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The judgment will be reversed and judgment will be entered here for \$594.72 with a finding of fact that that was the proper amount due from defendant.

REVERSED AND JUDGMENT HERE FOR \$594.72.

Scanlan, P. J., and Gridley, J., concur.

(34107)

FINDING OF FACT.

We find that the amount of plaintiffs' claim against defendant was \$594.72.

34116

HYMAN J. HILLSBERG,
Appellee,

v.

LAWRENCE AVENUE NATIONAL
BANK, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF THIS CO.

253 TA. 614⁴

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a finding and judgment of the court against defendant for \$619.34, the face value of a draft delivered to defendant bank for collection, drawn by plaintiff on the Diamond Motor Parts Co., of St. Cloud, Minn.

Delivered with the draft was a sealed envelope containing washier's checks and drafts to the amount of about \$2,000, all payable to the Diamond Motor Parts Co., given by customers of the company for purchase of its stock, which plaintiff was employed by it to sell.

Plaintiff handed the package and draft to an officer of the bank with the request that when the money was received on the draft it be deposited to his credit. The draft was forwarded to the bank's correspondent at St. Cloud, for collection by letter, saying, "surrender documents attached on payment only." It was returned uncollected, the drawee not accepting it nor being indebted to the plaintiff.

Just what became of the envelope and contents does not definitely appear. In the course of handling the matter the package was received by an employee of the bank to forward but she had no independent recollection of having done so. Defendant, however, offered to prove the receipt of the package by the Diamond

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20. The twentieth part is devoted to a detailed analysis of the case of a system of particles.

Motor Parts Co., and that its contents were its property and negotiated by it. The court erroneously sustained objection to the offer. It was competent on the question of damages.

While defendant as bailee in case of either loss or wrongful delivery would be liable for any damages plaintiff sustained, yet they must be actual damages, and the burden was upon him to prove them. As said in American Express Co. v. Parsons, 44 Ill. 312: "In all actions for wrongs, unaccompanied with circumstances which authorize a jury to give punitive damages, the true measure is the amount of damages that plaintiff really sustained."

It is contended by appellee, however, that the face value of his unaccepted draft was prima facie the measure of damages. Authorities cited by him on this proposition are not applicable to the facts in the case at bar. A fair example of them is where contrary to directions a bill of lading attached to a draft is delivered to the drawee without payment of the draft representing the value of the shipment. But on such a state of facts in Second Nat. Bank v. Bank of Alma, 95 Ark. 386, it was said that the plaintiff could only recover the actual loss by reason of the breach of duty, and that the defendant had the right to show that the plaintiff was not damaged by reason of the surrender of the bill of lading without payment of the draft and could do so by showing that the plaintiff was not the true owner of the draft and bill of lading. The case of Becker & Co. v. National Bank at Harvey, 18 N. H. 279, presents a similar state of facts where a bill of lading attached to a draft sent to a bank for collection was delivered without payment of the draft. The court said: "Conceding that the defendant exceeded its authority in regard to the bill of lading, it does not follow that the plaintiff can recover the face value of the draft which it is claimed

the bill of lading was security for. * * * The plaintiff could only recover the actual damage caused by loss, theft or misdelivery of the defendant." (Citing authorities.)

It is clear from the proof in this case that the contents of the envelope were not in fact held by plaintiff as security for any indebtedness to him, nor owned by him, and that in fact nothing was due him from the drawer. Nor was there an express agreement as to the amount of damages. Authorities cited on that subject are not pertinent.

But even if the draft had any such relation to the contents of the envelope as would warrant the claim that its amount was prima facie the measure of damages, as where the draft represents the value of documents attached, or where it is held as security for its payment, yet, regardless of the error in rejecting proof offered by defendant tending to show that the contents of the envelope were not security for payment of the draft or in any other legal relation thereto, it is clearly inferable from plaintiff's own evidence that he had no financial interest whatever in, or lien on, the contents of the envelope, and suffered no damage. Having failed to sustain the burden cast upon him to show that he sustained any damage as the result of either the loss or wrongful delivery of the package the judgment must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Scanlan, P. J., and Grisley, J., concur.

34116

VINDICATION OF DRAFT.

We find that the contents of the envelope in question were the property of the Diamond Motor Parts Co.; that said company was not indebted to appellee for any amount of the draft in question or any other one, and that the contents of the envelope in question were not held by appellee as security for the payment of the draft, and that appellee sustained no damage whether they were lost or successfully delivered to another party.

34143

JAMES M. FORT et al.,
Appellees,

v.

CONSUELO R. DOMEDICAR,
et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

258 I.A. 615

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendants to recover attorneys' fees for costs and professional legal services, giving an itemized account of the same, from October 11, 1923, to September 13, 1926. No question arises as to the items prior to August 29, 1925. The substance of the defense alleged is that defendants did not request or require such services but that they "sought, demanded and endeavored to procure from and of plaintiffs proper professional legal advice and services in the premises from August 29, 1925, to September 13, 1926," and that they did not receive "proper advice or proper professional legal services in the premises." Defendants also pleaded a set-off of \$700, of which \$500 was advanced for a redemption certificate from sale of property involved in the services rendered, and \$100 paid plaintiffs for services which defendants claimed were unwarranted, and \$100 for a certain purpose defendants claim was never carried out.

It appears the services rendered were with respect to the interests of defendants as remaindermen in real estate under the will of their father, and that the fee title was not to vest in the parties entitled thereto under the will for ten years after their mother's death. The property had gone to sale for taxes and litigation arose concerning the property that affected defendants'

interests, with respect to which correspondence and conferences were had between plaintiffs and one of the defendants, which tend to establish the relation of attorney and client between the parties with respect to the services rendered.

The balance claimed, according to the statement of claim, was \$418.94 after giving defendants credits, which include the items for which they claim a set-off. Evidence was introduced to show that the services were rendered, as itemized, and the charges therefor were fair, reasonable and customary. That such services were rendered is not questioned. Nor was there any evidence tending to show that the charges therefor were not fair and reasonable and customary. Appellants seek to raise a unique question whether the services were "proper", and in this connection show that some of the services were rendered in preparing an intervening petition, disallowed by the court, and a bill, which in appellees' judgment might accelerate the life estate to the benefit of defendants, but which they requested not to be filed. We shall not undertake to go into the details of the services rendered by plaintiffs. Suffice it to say, we think the relation of attorney and client existed and was recognized by defendants, that they sought plaintiffs' advice and received their services, and that plaintiffs acted in good faith, and apparently exercised their best judgment.

As to the set-offs, it appears that the money sent for the redemption of the tax sale was used for that purpose and duly credited to defendants. The set-off therefor cannot be maintained simply because plaintiffs have retained the certificate of redemption, on which they had a lien for their services until paid for.

The other items of set-off were evidently allowed by the jury, the verdict being about \$200 less than the amount claimed by plaintiffs. Plaintiffs ask that we enter judgment for the amount claimed. This we cannot do, (Dirich v. Berschner Contracting Co.,

312 Ill. 343), and plaintiffs have assigned no cross-errors.

The judgment is affirmed.

ATTORNEYS.

Scanlan, P. J., and Gridley, J., concur.

34152

FRANK J. HIGGINS,
Appellee,

v.

WILLIAM A. BOBULA et al.,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

258 I.A. 615²

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit. The cause was submitted to the jury on a count charging general negligence, and two counts predicated on the speed sections of the Motor Vehicle Act, and the plea of general issue.

Appellants contend that plaintiff was guilty of contributory negligence as a matter of law, that the court erred in refusing to withdraw a juror because of prejudicial testimony, and that the verdict is excessive and against the weight of the evidence.

The accident occurred at the northeast corner of Western avenue (a north and south street) and Archer avenue, which crosses the former in a northeast and southwest direction. Street cars run on both avenues, and some cars from the west on Archer are switched at the intersection to turn north on Western, either to continue north, or to be switched back from north of the intersection to the south bound track.

Just before the occurrence a car came from the southwest on Archer and was switched north on the north bound tracks on Western. If it was to continue north plaintiff intended to take it, and as it was coming around the curve he crossed from the northwest corner to the opposite side of Western avenue, in front of the Archer car. Just after he crossed the tracks on Western,

and had reached a point in dispute between the east rail of the north bound track on Western and the east curb of Western, he was struck by defendants' truck going north and while passing said moving car. The impact threw him to the ground and his left leg was run over, producing what is called a "Pott's fracture." The testimony for plaintiff was that he was struck by its right side and that for defendants that he was struck by its left side. But whichever the fact it is not controlling.

Plaintiff testified that he was about three feet from the east curb when he was struck, that he looked both south along Western and east on Archer after he had crossed the former and saw no approaching traffic, (except at some distance northeast on Archer), that he walked northward looking somewhat westerly or northwesterly, intending to board the Archer car if it stopped at that corner, and that he also looked southward on Western before starting across the street and saw no approaching traffic on it. The only other witnesses to the circumstances of the accident for plaintiff were the motorman of the Archer car, Becharat, and another motorman, Traskin, riding with him on the front platform of the car at the time. Each testified that he saw no north bound traffic on Western just before or as the car was making the turn but did see plaintiff cross the street, at which time the car was moving five or six miles an hour. The former did not see the accident nor learn of it until his car had gone on to a crossover switch about 100 feet north of the intersection and been switched south onto the south bound track. He testified that plaintiff crossed about fifty feet in front of his car; that the car was about half way around the curve when he was crossing over in front of a south bound car at the northwest corner of the intersection. Traskin

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testified that when he first saw plaintiff he was about twenty feet ahead of the street car on the south bound track walking fast across the street and got to about three feet from the curbstone on the east side when the truck struck him with its right side and he did not see the truck before it hit plaintiff, when it was about even with the front of the car, which kept going. The truck was going in second speed, about 10 or 12 miles an hour. On cross examination he admitted that he made a report to his company of the accident and probably did say plaintiff "ran" in front of the car, but said he meant he was walking fast. He was then asked if his mind was "fairly clear on it" at the time he made the statement, and he answered "it was not," and that it was "more clear on it now than it was then." Such answers tend strongly to discredit his testimony. That is significant, he said the accident happened even with the front end of the street car and just after plaintiff had passed in front of it, and in this respect his testimony harmonizes closely with defendants' version of the accident.

Both defendants were sitting in the front seat of the truck. Both testified that they had come all the way on Western Avenue north from Blue Island, a fact not controverted at the hearing, that they stopped on the south side of Archer Avenue a few feet south of its curb line in the north bound track for east bound automobile traffic for about a half a minute and that the Archer Avenue car had then just started to move around the turn with its front on the east bound track of Western Avenue. Thomas Sebula, who was driving the truck, was familiar with the location and switch movements there and noticed that the sign on the car was "75th & Western" and that its doors on the right-hand side were closed, thus indicating that it would switch back on the south bound track for 75th street (south) and

not stop for passengers at the northeast corner of the intersection; that he turned his truck out of the north bound track towards the east curb to pass the street car; that when he reached the north crosswalk the front end of his truck was about in the middle of the street car, that he was then picking up speed at about ten or twelve miles an hour to pass the car when plaintiff suddenly emerged in front of it only about two or three feet in front of his truck; that he immediately put on the brakes and skidded about eight feet before the truck stopped; that the left side of his truck struck plaintiff; that his brother got out of the truck and helped pull plaintiff from underneath the front axle on the left side of the truck.

William Sobula corroborated his brother's testimony in every material particular and said that when he pulled defendant out from underneath the left front of the truck he smelled "liquor on him" and thought he was drunk. Plaintiff admitted he had been drinking.

In an attempt to explain why plaintiff's witnesses did not see defendants' truck, appellee argues that it must have come from the west on Archer Avenue and not from the south on Western. If it came from the south on Western he could have seen it if he had reached a point near the curb and then looked for approaching cars on Western Avenue, as he testified. Hence the necessity of appellee's theory. But there was no controversy as to the fact that defendants came from Blue Island on Western Avenue, and there is nothing in the record that warrants questioning the veracity of defendants with respect to it. It is reasonable to infer from the testimony that plaintiff waiting to see if the Archer car was going north hastened to cross in front of it when he saw it was to turn and that just about the time it started to turn the truck came up to the crossing and that while the car was making the turn it obscured his vision of the truck, and under

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the same circumstances defendants did not see plaintiff until he emerged in front of the moving street car and the truck. The testimony that plaintiff was hastening across the street to catch the car, as he had to do under the circumstances, and that Traskik never saw the truck until it hit plaintiff, and that it was then about even with the front end of the car and "just after he had passed in front of the street car," is consistent with the testimony of defendants that when plaintiff was struck the truck was within three feet of the front of the car and that he had just passed in front of it. Under those circumstances he had no time to look and see whether a car was coming from the south. As he said: "I first saw this truck - well it came so quick on me, it was right on top of me; then I threw up my hands and kind of jumped back." He testified that he was "taking a chance" to board the car if it was going north, that he walked "pretty lively" and started when the car started around the curve, and that when he had passed by the front of the car he turned around facing west and was "facing kind of northwest when he was hit." The distance between the east rail of the north bound street car track to the east curbstone is twelve feet. Taking into consideration the overlap of the car and plaintiff's estimate of getting within about three feet from the curb, he in any event had very little space to cover after passing in front of the car before he was struck, and very little time for calculation. He evidently did not stop under such circumstances and look for traffic.

We think that the verdict is contrary to the weight of the evidence bearing upon both issues as to whether there was negligence by defendants and contributory negligence by plaintiff. If there was any negligence on the part of defendants it must have been in passing the car at a point where passengers might be expected to take it. But knowing, as they did, that the car they were passing was not to stop and that there were no persons waiting there on the east side

of Eastern avenue to take it, we think the evidence was insufficient under all the circumstances to prove negligence on the theory that they should have anticipated that some one might hasten to cross in front of a moving car after it had passed over the crosswalk for half its length with every indication of not stopping there. But while that was a question of fact for the jury, we think that the finding of contributory negligence was manifestly against the weight of the evidence under all the circumstances above detailed. Plaintiff and his witnesses having testified that he crossed some twenty feet in front of the Archer avenue car ^{as he} and ~~might~~ thus have reached the east side of Eastern avenue in time to have been seen by the approaching truck before it was "just on top of him," we cannot say that the question of contributory negligence was one of law. But we are forced to the conclusion that the finding ^{against} ~~of~~ contributory negligence as a matter of fact was against the manifest weight of the evidence and all the reasonable inferences therefrom.

As it becomes necessary, therefore, to reverse the judgment and remand the cause for a new trial the other points urged as error need not be considered.

REVERSED AND REMANDED.

Desaulnier, J., and Gridley, J., concur.

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MAX GRUMI, W. A. BROWN and
M. DIAMONT, as Receivers of
the Community Mortgage Loan
Company, a common law trust,
Appellants.

v.

RUSSELL FIREBAUGH, individually
and as trustee, BOND AND MORTGAGE
COMPANY, a corporation, VSIS
CORNELL AVENUE BUILDING CORPORATION,
BENJAMIN BERGQUIST, CHAS. J.
TOPKIN and JEROME S. NADAL,
Appellees.

ALFRED H. H.

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25810-015³

MR. JUSTICE ORIDLEY DELIVERED THE OPINION OF THE COURT.

Complainants, as receivers of the Community Mortgage
Loan Company, a common law trust, (hereinafter called the loan
company) have appealed from a decree, entered October 3, 1928,
wherein the circuit court, contrary to the recommendations of the
master, dismissed their bill for want of equity.

Complainants' amended bill, filed February 6, 1929,
is in the nature of a bill to review and have modified in certain
respects a decree of the circuit court, entered in the cause of
Bergquist v. Nadal et al., on December 28, 1928, as well as a
certain subsequent order, and for general relief.

In the bill it is alleged that in September, 1923,
Bergquist filed his bill in said cause to foreclose a claimed
mechanic's lien on improved real estate in Cook county owned by
Jerome S. Nadal; that Benjamin Bernikoff, "as the legal holder
and owner of certain notes, 7 to 14 inclusive, for the amount of
\$12,500," (signed by Nadal) filed a cross-bill to foreclose a
trust deed (a second mortgage securing the notes) to Ida Topkin,
as trustee, recorded January 25, 1924, as document No. 7787098;
that Russell Firebaugh filed another cross-bill of foreclosure

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1. The purpose of this document is to provide information regarding the activities of the [redacted] in the [redacted] area.

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on behalf of the legal holders and owners of certain bonds secured by a prior trust deed (a first mortgage) to him as trustee; that the proceedings resulted in the entry on December 22, 1925, of a decree of sale of the property, wherein the court found that Bergquist was not entitled to a mechanic's lien, but found that there was due to Firebaugh, as trustee, the sum of \$135,204.31, which amount included \$15,000 and \$750 for his solicitor's and his trustee's fees respectively, and also "found due to said Benjamin Melnikoff," on the notes secured in the trust deed to said Ida Kopkin, the sum of \$15,448.62, and decreed that unless Nadel and wife, or some of the defendants, should cause to be paid within ten days to Firebaugh the amount due to him as trustee, and also cause to be paid to Melnikoff the amount due to him, the real estate be sold, etc.; that no attempt was made by either of the cross-complainants to enforce the provisions of the decree and no sale in fact was made in pursuance thereof; and that on April 6, 1926, a written agreement was executed between Firebaugh, as trustee, Charles J. Kopkin, as trustee, and said Nadel.

It is further alleged that it is provided in said agreement that "in lieu of proceedings under said decree of sale," Kopkin is to deposit the notes secured by the trust deed (the second mortgage) to Ida Kopkin, together with an additional sum of \$2500, and Nadel and wife are to deposit their deed conveying their equity in the premises to said Kopkin and Firebaugh, as trustees, upon the following conditions: (a) that Firebaugh, as trustee for the Bond and Mortgage Co., (legal holder and owner of the bonds secured by the first mortgage) "is to secure the vacating of said decretal order of foreclosure and to reinstate the bond issue for the then unpaid balance in the sum of approximately \$113,000, bearing interest at 6-1/2% per annum from March 15, 1926;" (b) that the premises are

to remain in the possession and control of Hopkin and Firebaugh, as trustee, and they are to collect the rents and income thereof and pay the necessary running expenses; (c) that Hadel (owner of the equity of redemption) "shall have 12 months from the date of the agreement (April 8, 1926) to pay any amounts of money advanced or to be advanced by said trustees, plus the sum then due and owing on the notes secured by the trust deed to Ida Hopkin (and mortgage) and upon payment of said amounts said trustees shall reconvey the premises to said Jerome ' Hadel;" and (d) that, upon the failure of said Hadel to so redeem the premises within said 12 months' period, then said Melnikoff, or his nominee or assignee, shall have the right to redeem the premises upon the payment to said trustees of any amounts found to be due to them upon a final accounting, and the trustees shall hold title to the premises for 15 months, and, if at the expiration of 15 months no such redemption shall be made then they may convey the premises to any person designated by said Firebaugh, trustee, and "the lien of said Benjamin Melnikoff, by virtue of the notes secured by said trust deed and the decretal order of the court, shall cease and determine."

It is further alleged that on June 28, 1926, Firebaugh, as trustee, filed his verified petition in the Bergquist cause. This petition is set out in full in the bill, and in it, after mentioning the entry of the decree of sale of December 28, 1925, and that no appeal had been taken therefrom and that it remained in full force and effect, Firebaugh alleged in substance that no sale thereunder had been made, - "there being under consideration plans of arriving at and bringing about a waiver of the default on the part of the grantors in the trust deed;" that the trustees provided that upon the request of a majority in amount of the holders of the bonds a default might be waived; that all of the principal of the due bonds,

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plus interest, has been collected and paid out of the income of the premises; that a majority in amount of the holders of the bonds (\$60,000 thereof) had in writing requested him as trustee to waive the default and he had done so, notifying the mortgagors (the Nadels); that the indebtedness, found due in the Bargainist decree to said Benjamin Melnikoff upon said second mortgage, together with costs and expenses, "has been paid, satisfied and discharged" and the trust deed to Ida Kopkin "has been released of record;" that the equity of redemption has been conveyed to said Firebaugh and Kopkin as trustees; "under the provisions of a Trust Agreement, dated April 9, 1936, and known as Trust No. 2, and in deed of trust recorded April 30, 1936, document 9252791;" that Firebaugh and Kopkin as trustees are entitled to possession of the premises; that, "by stipulation (then presented) of the two Nadels, the mortgagors and former owners of the equity of redemption of the premises, and of all other parties to said cause, formerly interested in the premises as found and determined by said decree," all parties in interest have consented to the entry of an order discharging the receiver, and that he be directed to file a final account and "to pay to said Firebaugh, as trustee, or to his order," an account of the indebtedness found in said decree to be due to him as such trustee, "such sums as shall be in the hands of such receiver," etc. Firebaugh's petition prayed that "an order be entered to terminate the force of the decree of sale heretofore entered, and that neither petitioner (Firebaugh) nor Benjamin Melnikoff, or any other party to the suit, by reason of said decree of sale, shall be entitled to nor procure to be made any sale of said premises, - all, however, without prejudice to the lien of said trust deed to said Firebaugh, as trustee," and that it be further ordered that said receiver turn over the possession of the premises to Firebaugh and Kopkin, as trustees, and also pay over to

Firebaugh all funds now in his hands and that he be discharged as receiver, etc.

It is further alleged that on the same day (June 22, 1926) the court entered in the Bargainist cause an order as prayed for by Firebaugh. The order is set out in full in the bill and in it the court found inter alia that, as to the indebtedness found in said decree of sale to be due to Melnikoff under said second mortgage, the same "has been paid, satisfied and discharged, and that said trust deed to Ida Kopkin, as trustee, has been released of record."

It is further alleged in complainant's bill, that Melnikoff "was not the legal holder and owner of the notes secured by the trust deed to Ida Kopkin, but that the Loan Company * * was the legal and equitable owner thereof," and all parties to said proceedings, including Firebaugh, "had knowledge thereof"; that said loan company was managed by approximately eleven (11) trustees; that "none of them, with the exception of said Melnikoff and Charles J. Kopkin, had any knowledge of the aforesaid agreement, or of the fact that Melnikoff claimed to be the owner of the notes, and that said trustees did not consent to said agreement and did not authorize anyone in their behalf to consent to the same;" that the averment in Firebaugh's petition, as regards the payment and satisfaction of the notes secured by said trust deed to Ida Kopkin, was not true, and that Firebaugh made the averment "with the intent to defraud the Loan Company from their lien on the premises;" that said notes, as found due in said decree of sale in the sum of \$13,448.62, had never been paid, and of this Firebaugh had knowledge; that he "fraudulently procured the cancellation of said indebtedness;" that notwithstanding the provisions in said agreement of April 2, 1926, that the premises should be held in trust for 15 months, Firebaugh and Kopkin violated their trust and on April 2, 1926, conveyed the premises to Ida Wagner, an employee of Firebaugh, who paid no consideration therefor; that said conveyance was made with

the fraudulent intent of defrauding the Loan Company of their equity of redemption; that Firebaugh has since caused a corporation to be organized under the name of 7615 Cornell Avenue Building Corporation and has also caused said agent to convey the premises to it; that all of the shares of said corporation are owned by Firebaugh, as trustee for the Bond and Mortgage Company; that the premises are now in his exclusive possession; that Melnikoff was one of the trustees of the Loan Company, and that said amount of \$15,448.62, decreed to be due him in said decree of sale of December 23, 1923, is still unpaid, and "rightfully and equitably" belongs to complainants.

The bill prayed for an accounting as to all moneys received from the premises by Firebaugh; that "the order of June 23, 1923, in so far as it affects the right, title and interest of your creditors, etc., may be vacated and set aside;" that the sale as provided for in said decree of December 23, 1923, may be enforced, and the premises be sold by virtue of Melnikoff's cross-bill for the amount due as found in said decree; that your creditors "may be subrogated to all the rights, title and interest of said Melnikoff, as decreed creditor under the notes secured by the trust deed to Ida Perkins;" and that a sale of the premises may be had subject to the unpaid balance due to Firebaugh, as trustee, etc. There is also a prayer for general equitable relief.

Melnikoff, served with process, did not file an answer and was defaulted. Firebaugh and the Bond and Mortgage Company filed a joint and several answer. They admitted that the proceedings were had in the Bergquist cause as alleged; and that the agreement of April 6, 1924, was executed and acted upon. They alleged that Melnikoff and Ethel M. Kadel, wife of Jerome M. Kadel, were also parties to the agreement and were bound thereby; that, pursuant to it,

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there were delivered to the Chicago Title & Trust Co., as successor, deeds of conveyance vesting the title to the premises in Firebaugh and Charles J. Hopkin, as trustee; that Ida Hopkin, as trustee in the trust deed, No. 7727092, executed and delivered her release deed, which was filed for record on May 15, 1926, and accordingly, the indebtedness, as evidenced by said notes 7 to 14 inclusive (herein claimed as being owed to complainants), was "in accordance with the intent of the parties to the agreement," paid and discharged; that during the 18 months immediately following April 8, 1926, no payment in the way of redemption under said agreement was made by the Estate of or Melnikoff, or by any person for them, and on July 13, 1927, (after the expiration of said 18 months) Firebaugh and Charles J. Hopkin, as trustees, conveyed the premises to Ida Wagner, the nominee of Firebaugh, and on the same day said deed to her was recorded; and that thereafter, on July 23, 1927, she conveyed the premises to the 7212 Cornell Avenue Building Corporation, and it is now the owner thereof in fee simple, free and discharged from any lien, such as now claimed by complainants. Said defendants also denied that they at any time had knowledge that the Loan Company was the legal or equitable owner of said notes 7 to 14, inclusive, denied that either of them was guilty of any fraud, and alleged that at all times they were led to believe and did believe that Melnikoff was the true owner of said notes; that he had them in his possession and was the apparent owner of them; that, if the Loan Company was then in fact the owner, Melnikoff, as trustee and agent for it, was fully authorized by it to possess them; and said Loan Company should be held to be estopped from now claiming otherwise. The answer of the defendant, 7212 Cornell Avenue Building Corporation, contained similar denials and allegations.

The cause was referred to a master to take proofs and report his conclusions of law and fact. Much evidence, oral and

documentary, was introduced before him by the respective parties. His report was filed on July 30, 1929. In it, after making numerous findings, he recommended that a lien in favor of the Loan Company be decreed upon the premises "upon trust deed notes, 7 to 24, inclusive, described in and secured by the trust deed to Ida Kopkin, trustee, document No. 7737093, subject only to the unpaid balance of the first trust deed of record to Russell Firebaugh, trustee;" and further recommended that the sum of \$10,000, allowed in said decree of December 25, 1925, to Firebaugh as a solicitor's fee, and also the sum of \$750, allowed to him as a trustee's fee, be disallowed, and not be added to the principal indebtedness secured by the first trust deed; and that Firebaugh be required to account to complainants, etc. On exceptions to the master's report there was a hearing before the chancellor, resulting in the entry of the decree dismissing complainants' bill for want of equity as first above mentioned.

Numerous contentions are here made by counsel for complainants as grounds for a reversal of this decree, but we deem it unnecessary to discuss them, as we think that certain counter contentions urged by defendants' counsel are decisive of the issues and require an affirmance of the decree. Complainants did not prove on the hearing that at the time the present suit was commenced (October 15, 1927), there was any indebtedness owing to the Loan Company, on said notes, 7 to 24, inclusive. No such notes appeared to be in complainants' possession and they were not introduced in evidence. Complainants introduced a certified copy of the decree of sale entered in the Bergquist cause on December 25, 1925. In that decree the court found inter alia that "there is due to Benjamin Melnikoff, as the legal holder and owner of the notes, secured by the trust deed to Ida Kopkin, as trustee, the sum of \$15,442.62." The fact that in

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

The work has been carried out in accordance with the programme of work approved by the Council of the League of Nations. The main objects of the work have been to collect and publish information on the various aspects of the life of the people of the country, and to study the causes of the various social and economic problems which are afflicting the country.

The work has been carried out in a systematic and methodical manner, and the results have been of great value to the League of Nations and to the people of the country. The information collected has been published in a series of reports, and the results of the studies have been published in a series of books.

The work has been carried out in a spirit of co-operation and collaboration with the various departments of the Government, and the results have been of great value to the League of Nations and to the people of the country.

The work has been carried out in a spirit of co-operation and collaboration with the various departments of the Government, and the results have been of great value to the League of Nations and to the people of the country.

December, 1923, there was such a sum due to Melnikoff is no evidence that when the present action was begun there was, or now is, any sum due to complainants, as receivers of the Loan Company. Furthermore, after reviewing the evidence, we think that it sufficiently appears that the acts of Melnikoff, in releasing the indebtedness as evidenced by said notes, as well as the lien of the trust deed securing them (following the agreement of April 6, 1926) were authorized by a majority of the trustees of the Loan Company, and that complainants, as receivers, are bound thereby. The testimony discloses that Melnikoff was the office manager and one of the trustees of the Loan Company; ^{that} Charles J. Hopkins was also a trustee; and that, before the agreement of April 6, 1926, was executed, numerous tentative drafts thereof were submitted to a majority of the trustees and, in its final form as executed, they approved of it. And we do not find evidence showing that either Firebaugh or Charles J. Hopkins was guilty of any fraudulent acts as charged. Furthermore, we do not think that complainants, as receivers of the Loan Company, are in any position to maintain the present bill, which is in the nature of a bill to review the decrees in said Bergmist cause. It was not a party to that cause. Not being a party, and consequently not affected by the decrees, neither it, nor its present receivers, can properly maintain a bill of review. (Goodrich v. Thompson, 83 Ill. 206, 208; Olea v. Fugate, 259 Ill. 332, 336.) Complainants pray in their bill that they may be "subrogated to all the rights, title and interest of said Melnikoff, as decree creditor," etc. We fail to perceive how they, as the present representatives of the Loan Company, not a party to a suit in which a final decree has long since been entered, can properly be subrogated to the rights of a particular party therein, or be

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substituted for such party. Apparently what complainants really seek by their bill is a modification of the decrees in the Bergquist cause, long after the terms of their rendition, wherein their names may be substituted for that of Melnikoff. The Circuit court could not properly make such modification. (Tozetti Brewing Co. v. Koehler, 233 Ill. 369, 372.)

Our conclusion is that the decree of the Circuit court, dismissing complainants' amended bill for want of equity, should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

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34068

FRANCIS DYER,
Appellee.

v.

MINNEAPOLIS, ST. PAUL
& SAULT STE MARIE RAILWAY
CO., a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

253 I.A. 615⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff on September 17, 1926, there was a trial before a jury in November, 1929, resulting in a verdict against defendant for \$25,000. On December 14, 1929, after plaintiff had remitted \$10,000, the court entered judgment against defendant for \$15,000. The present appeal followed.

Plaintiff's declaration, to which defendant filed a plea of the general issue, consisted of four counts. In the first he alleged that on the day mentioned defendant owned and was operating a certain engine and train south bound upon and along its railroad tracks in Cook county, Illinois, at a place where they are intersected by a public highway, known as Hegar Road; that defendant so negligently operated its train that it ran into and collided with an automobile track, which plaintiff was then driving in a westerly direction on said road and across the tracks; and that as a result of the collision he was violently thrown a great distance and upon the ground, and suffered serious and permanent injuries, etc. The second count charged that the train was being operated "at a high and negligent rate of speed;" the third charged negligence in failing to ring a bell, sound a whistle

or give a warning of the approach of the train; and the fourth charged willful and wanton negligence. Apparently, this fourth count was withdrawn, and later in the trial plaintiff, by leave of court, filed an additional count charging general negligence in the operation of the train and also that defendant "negligently maintained its said tracks and equipment and its crossing at said Seegar Road." To this count also defendant filed a plea of the general issue. In each count that went to the jury it is alleged that before and at the time of the collision plaintiff was in the exercise of due care for his own safety.

Upon the trial plaintiff was a witness in his own behalf and his only other occurrence witness was Stephen Flossa, who at the time of the collision was driving another auto truck westerly on Seegar Road. Plaintiff also introduced in evidence certain photographs of the crossing and surrounding country. Among defendant's witnesses were the engineer and fireman on the engine, which was in front of a milk car, baggage car and two passenger coaches. Defendant also introduced other photographs and a map of the crossing, etc. Loomis, a civil engineer and surveyor in defendant's employ, testified as to the making of the map and as to certain surveys, measurements, observations, etc., made by him and an assistant after the accident. Defendant's defenses at the trial were that it was not guilty of any negligence, and that plaintiff was guilty of such contributory negligence as barred a recovery by him. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict in its favor, but the motions were denied.

From the documentary and other evidence, it appears that at the crossing and for considerable distances both north and south of Seegar Road, defendant's two parallel railroad tracks, within a

Source: *U.S. Census Bureau, Current Population Reports, 1990, 1995, 2000, 2005, 2010, 2015, 2020, 2025, 2030, 2035, 2040, 2045, 2050, 2055, 2060, 2065, 2070, 2075, 2080, 2085, 2090, 2095, 2100, 2105, 2110, 2115, 2120, 2125, 2130, 2135, 2140, 2145, 2150, 2155, 2160, 2165, 2170, 2175, 2180, 2185, 2190, 2195, 2200, 2205, 2210, 2215, 2220, 2225, 2230, 2235, 2240, 2245, 2250, 2255, 2260, 2265, 2270, 2275, 2280, 2285, 2290, 2295, 2300, 2305, 2310, 2315, 2320, 2325, 2330, 2335, 2340, 2345, 2350, 2355, 2360, 2365, 2370, 2375, 2380, 2385, 2390, 2395, 2400, 2405, 2410, 2415, 2420, 2425, 2430, 2435, 2440, 2445, 2450, 2455, 2460, 2465, 2470, 2475, 2480, 2485, 2490, 2495, 2500, 2505, 2510, 2515, 2520, 2525, 2530, 2535, 2540, 2545, 2550, 2555, 2560, 2565, 2570, 2575, 2580, 2585, 2590, 2595, 2600, 2605, 2610, 2615, 2620, 2625, 2630, 2635, 2640, 2645, 2650, 2655, 2660, 2665, 2670, 2675, 2680, 2685, 2690, 2695, 2700, 2705, 2710, 2715, 2720, 2725, 2730, 2735, 2740, 2745, 2750, 2755, 2760, 2765, 2770, 2775, 2780, 2785, 2790, 2795, 2800, 2805, 2810, 2815, 2820, 2825, 2830, 2835, 2840, 2845, 2850, 2855, 2860, 2865, 2870, 2875, 2880, 2885, 2890, 2895, 2900, 2905, 2910, 2915, 2920, 2925, 2930, 2935, 2940, 2945, 2950, 2955, 2960, 2965, 2970, 2975, 2980, 2985, 2990, 2995, 3000, 3005, 3010, 3015, 3020, 3025, 3030, 3035, 3040, 3045, 3050, 3055, 3060, 3065, 3070, 3075, 3080, 3085, 3090, 3095, 3100, 3105, 3110, 3115, 3120, 3125, 3130, 3135, 3140, 3145, 3150, 3155, 3160, 3165, 3170, 3175, 3180, 3185, 3190, 3195, 3200, 3205, 3210, 3215, 3220, 3225, 3230, 3235, 3240, 3245, 3250, 3255, 3260, 3265, 3270, 3275, 3280, 3285, 3290, 3295, 3300, 3305, 3310, 3315, 3320, 3325, 3330, 3335, 3340, 3345, 3350, 3355, 3360, 3365, 3370, 3375, 3380, 3385, 3390, 3395, 3400, 3405, 3410, 3415, 3420, 3425, 3430, 3435, 3440, 3445, 3450, 3455, 3460, 3465, 3470, 3475, 3480, 3485, 3490, 3495, 3500, 3505, 3510, 3515, 3520, 3525, 3530, 3535, 3540, 3545, 3550, 3555, 3560, 3565, 3570, 3575, 3580, 3585, 3590, 3595, 3600, 3605, 3610, 3615, 3620, 3625, 3630, 3635, 3640, 3645, 3650, 3655, 3660, 3665, 3670, 3675, 3680, 3685, 3690, 3695, 3700, 3705, 3710, 3715, 3720, 3725, 3730, 3735, 3740, 3745, 3750, 3755, 3760, 3765, 3770, 3775, 3780, 3785, 3790, 3795, 3800, 3805, 3810, 3815, 3820, 3825, 3830, 3835, 3840, 3845, 3850, 3855, 3860, 3865, 3870, 3875, 3880, 3885, 3890, 3895, 3900, 3905, 3910, 3915, 3920, 3925, 3930, 3935, 3940, 3945, 3950, 3955, 3960, 3965, 3970, 3975, 3980, 3985, 3990, 3995, 4000, 4005, 4010, 4015, 4020, 4025, 4030, 4035, 4040, 4045, 4050, 4055, 4060, 4065, 4070, 4075, 4080, 4085, 4090, 4095, 4100, 4105, 4110, 4115, 4120, 4125, 4130, 4135, 4140, 4145, 4150, 4155, 4160, 4165, 4170, 4175, 4180, 4185, 4190, 4195, 4200, 4205, 4210, 4215, 4220, 4225, 4230, 4235, 4240, 4245, 4250, 4255, 4260, 4265, 4270, 4275, 4280, 4285, 4290, 4295, 4300, 4305, 4310, 4315, 4320, 4325, 4330, 4335, 4340, 4345, 4350, 4355, 4360, 4365, 4370, 4375, 4380, 4385, 4390, 4395, 4400, 4405, 4410, 4415, 4420, 4425, 4430, 4435, 4440, 4445, 4450, 4455, 4460, 4465, 4470, 4475, 4480, 4485, 4490, 4495, 4500, 4505, 4510, 4515, 4520, 4525, 4530, 4535, 4540, 4545, 4550, 4555, 4560, 4565, 4570, 4575, 4580, 4585, 4590, 4595, 4600, 4605, 4610, 4615, 4620, 4625, 4630, 4635, 4640, 4645, 4650, 4655, 4660, 4665, 4670, 4675, 4680, 4685, 4690, 4695, 4700, 4705, 4710, 4715, 4720, 4725, 4730, 4735, 4740, 4745, 4750, 4755, 4760, 4765, 4770, 4775, 4780, 4785, 4790, 4795, 4800, 4805, 4810, 4815, 4820, 4825, 4830, 4835, 4840, 4845, 4850, 4855, 4860, 4865, 4870, 4875, 4880, 4885, 4890, 4895, 4900, 4905, 4910, 4915, 4920, 4925, 4930, 4935, 4940, 4945, 4950, 4955, 4960, 4965, 4970, 4975, 4980, 4985, 4990, 4995, 5000, 5005, 5010, 5015, 5020, 5025, 5030, 5035, 5040, 5045, 5050, 5055, 5060, 5065, 5070, 5075, 5080, 5085, 5090, 5095, 5100, 5105, 5110, 5115, 5120, 5125, 5130, 5135, 5140, 5145, 5150, 5155, 5160, 5165, 5170, 5175, 5180, 5185, 5190, 5195, 5200, 5205, 5210, 5215, 5220, 5225, 5230, 5235, 5240, 5245, 5250, 5255, 5260, 5265, 5270, 5275, 5280, 5285, 5290, 5295, 5300, 5305, 5310, 5315, 5320, 5325, 5330, 5335, 5340, 5345, 5350, 5355, 5360, 5365, 5370, 5375, 5380, 5385*

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fenced right of way about 55 feet wide, run practically north and south; that south bound trains run on the west track and north bound trains on the east track; that the distance between the centers of the two tracks is 13 feet; that Seegar Road, about 15 feet wide, commences at Rand Road about 1000 feet east of the tracks, runs westerly and crosses the tracks substantially at right angles; that the district is open country; that commencing about 500 feet north of Seegar Road the tracks curve slightly towards the northwest; that about where the curve commences there is a farm house east of the tracks, also some barns, trees, bushes, fence posts, telegraph poles, etc., obstructing the view of a train (to the north thereof and moving south on the west track) of one on Seegar Road east of the tracks; that if one is on Seegar Road about 50 feet east of the west track, he has practically an unobstructed view of a train approaching from the north for a distance of about 900 feet to the north; if one is on said Road nearer the track his range of vision to the north is greater, and if farther away from the track it is less; that there is an ascending grade in Seegar Road east of and just before it crosses the tracks; and that the crossing was in good condition with planks between the rails, but that there were some holes or depressions in the pavement of Seegar Road all the way from Rand Road to the tracks and a few in said ascending grade.

Among the several grounds here urged by defendant's counsel for a reversal of the judgment is the main one that plaintiff was guilty of negligence as a matter of law, and, hence, the trial court erred in denying defendant's motions for a directed verdict in its favor and in entering the judgment.

Plaintiff's testimony disclosed the following: The accident happened a few minutes before noon on September 17, 1916, which was a clear, bright day. Plaintiff was an experienced driver of auto trucks. He was in the employ, and had been for several

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months, of the Elliott Wholesale Grocery Co. at Forest Park, Illinois. It was his duty every Friday to drive his employer's heavy auto truck, laden with various groceries, and make deliveries of the contents at several points in the northwest part of Cook county. In making his trips he usually travelled over Rand Road, then into Meagar Road and across defendant's tracks. He was well acquainted with the particular crossing and its surroundings. On direct examination plaintiff testified in substance that on the morning mentioned, after driving northwest on Rand Road, he turned into Meagar Road and slowed down to a speed of about six miles per hour, for the reason that its pavement was in "very bad condition," having in it many holes; that, as one travels west on the road and looks to the north "across the prairie," one sees "a large farm house, several barns and 10 or 15 large trees in foliage," which obstruct the view further to the north; that as he travelled along he "watched for a train" coming from the north, but did not see any signs of one; that as one gets to within 10 or 15 feet of the tracks there is a "sharp grade - going up maybe 25 or 30 inches;" that on the morning mentioned he stopped his truck "about 10 feet away from the tracks and looked both ways and listened;" that he could then "look up the tracks as far as they were straight," - to the north "maybe 675 feet;" that then "there was no sign of any train;" that he did not hear any whistle blow or bell ring; that then he started to go up the grade and across the tracks, and "got partly across the far (west) track, and I looked up, * * and then was when I first noticed the train; it was almost upon us, - maybe 150 or 200 feet away; I gave the truck the gas, but I was only moving about two miles an hour; the truck was in low speed, but I couldn't move it any faster, and * * I didn't have time to jump or anything;" and that "then the train hit me and all, * I flew down; I cannot tell how I went, but I finally came to a stop and just laid there," etc.

On cross-examination plaintiff testified that he had "no defect of sight or hearing;" that when he came to a stop east of the tracks it was "at the foot of the rise * * at the bottom of the grade; * * I was just ahead of the line of poles so I could look down the track, * * and so that I could see inside the line of fence;" that after he had so stopped he started to cross the tracks; that when the truck was struck by the train its front wheels were "about five feet west of the furthestmost rail of the south bound (west) track" and that he would say that the truck was hit "just in front of its back wheels" and "back of the cab" in which he was sitting; that, from the place where he had stopped and started up again, to the place where the collision occurred, the distance travelled by the truck was "approximately 25 feet;" that "when I first saw the train" the front wheels of the truck "were over both rails of the south bound (west) track."

Plaintiff further testified:

"I looked as I started up - just as I started I looked. I looked to that side (to the north), because the other side is perfectly clear; you can see (to the south) for maybe a mile. * * Then I had to watch my truck because there were holes in the road and the road was bad. * *

Q. And where were you when you again looked?

A. I was - my front wheels were just over the south bound track. * * .

Q. So you looked twice, - once as you started and once as your wheels were over the furthestmost rail of the south bound track?

A. Yes.

Q. And you did not look at any time in between?

A. No, there would only be just a second in between. * *

Q. You did not look again, did you?

A. Not that I remember."

Plaintiff's witness, Flossha, the driver of the other auto truck following plaintiff's truck, testified in substance that after turning into Seeger Road he put his truck in low gear, because the road was "full of holes", and travelled west at the rate of about 5 miles per hour; that he saw plaintiff's truck ahead of him about 200 feet and saw plaintiff stop just east of

the crossing, and then start again to cross the tracks; that at this time he (Plozha) was about 400 feet east of the crossing and he "saw the train about 600 or 700 feet north of Seeger Road;" that he first noticed the engine of the train "about 1000 feet north" after it had "made the curve around a farm house;" that the train "was going about 50 or 60 miles an hour;" that he watched both the train and plaintiff's truck; that when the train was about 600 feet north of Seeger Road plaintiff's truck "was starting slowly across the tracks;" and that "from that time up until the collision occurred" the engine "didn't sound a whistle nor ring a bell."

It further appears from the evidence that, at a short distance to the north of said farm house, barns, etc. Sand Road crosses defendant's tracks diagonally. The engineer on the train testified in substance that as he approached Sand Road he blew the whistle - two long and two short blasts; that previously he had set going the automatic bell on the engine and it was ringing and it continued to ring as the train approached and reached Seeger Road; that he "sounded the whistle for Seeger Road" just about the time he was crossing Sand Road; that the speed of the train was about 35 miles per hour; and that as he approached Seeger Road, sitting on the west side of the cab, he did not notice plaintiff's truck until just before the collision. His testimony, as to the whistle having been sounded and as to the bell being continuously rung as the train approached Seeger Road, is corroborated by the testimony of the fireman on the engine, a flagman on the train and a passenger.

After a careful review of the evidence, and particularly the testimony of plaintiff himself, we are of the opinion that he was guilty of negligence directly contributing to his injuries, as a matter of law, in attempting to cross defendant's tracks at the

time and manner and under the circumstances as shown, and that the judgment cannot stand. Even if it be considered that no whistle was sounded or bell rung as the train approached Seegar Road and that the pavement of that road immediately east of the tracks was in bad condition and full of holes, demanding more than usual attention by the driver of an automobile thereon, it clearly appears that if plaintiff, after having started to cross the tracks and before reaching them, had looked to the north, he could have seen the approaching train and have avoided the collision. In the case of Greenwald v. Baltimore & Ohio R. Co., 332 Ill. 627, the facts are somewhat similar. The action was for damages to the plaintiff's auto truck, caused by its collision with a train of the defendant railroad company. At the close of the plaintiff's evidence the court, on defendant's motion, instructed the jury to return a verdict in its favor, and a judgment for defendant followed. The appellate court, first division, of this district, affirmed the judgment. The case reached our Supreme Court on appeal by certificate of importance, where the appellate court's judgment was affirmed. In the opinion (pp. 631-3) it is said in part:

"It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence. * * One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look, or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. * * The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it. * * In this case it seems clear from the testimony of appellant's witnesses, taken in its most favorable light, that appellant's agents, had they continued to look toward the southeast after going upon the tracks, would have seen the approaching train in ample time to have avoided the collision. Appellant's evidence most favorable to him is, that when standing on the first or south track, which the testimony shows is from 30 to 40 feet south of the third track, on which the collision occurred, one can see at least 200 feet in the direction from which the train was approaching. Neither of appellant's servants testified that after going upon the first or south track they again looked toward the

southeast until they were crossing the second track. It seems clear that had they done so the collision would have been avoided. They testify that they heard no sound of warning, such as the blowing of a whistle or ringing of a bell. The duty resting upon one who crosses a railroad track is not only to listen but to look, and the fact that no bell was rung or whistle blown, if such was the fact, would not excuse him from using due care to look in the direction from which a train might be coming, and in this case had appellant's servants done so it seems clear that the collision would have been avoided."

We think that the decision and holdings in the Goodman case are particularly applicable to the facts of the present case. And the case of Goodman, Admin., v. Chicago & Eastern Illinois R. Co., 248 Ill. App. 138, may also be cited. In that case one Goodman, while driving his automobile across the railroad tracks of the defendant company, was struck by a passenger train and killed. In the action for damages brought by the administratrix of his estate a jury returned a verdict in her favor for \$2,500, upon which judgment was entered against defendant. The facts of the case as disclosed from the evidence are outlined in the court's opinion. Defendant's motions for a directed verdict in its favor were denied by the trial court. On appeal the first division of the appellate court for this district reversed the judgment without remanding the cause, holding (p. 138) "that plaintiff was guilty of negligence directly contributing to his death, as a matter of law, and that the trial court should have directed a verdict for the defendant." A writ of certiorari was denied by our Supreme Court (248 Ill. App. p. xiv). In the course of its opinion the appellate court quoted from an opinion of the United States Supreme Court, by Mr. Justice Holmes, in the case of Baltimore & Ohio R. Co. v. Goodman, 275 U. S. 66, 69-70, as follows:

"When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true as said in

Flannelly v. Delaware & Hudson Co., 220 U. S. 397, 607, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.*

In our opinion these holdings of the Supreme Court of the United States are also particularly applicable to the facts of the present case.

Other contentions are made by defendant's counsel as grounds for a reversal of the present judgment, but it is unnecessary to consider them. After defendant's counsel's reply brief had here been filed plaintiff's counsel filed a written motion to strike certain portions of the brief and the motion was reserved to the hearing. It is now denied.

Our conclusion is, and we so hold, that plaintiff in the present case was guilty of negligence directly contributing to his injuries, as a matter of law, and that the circuit court should have directed a verdict for the defendant railroad company. For this reason the judgment appealed from is reversed without remanding the cause.

REVEREND.

Barnes, J. concurs;
Seaman, P.J., specially concurring.

THE UNITED STATES OF AMERICA
 DISTRICT COURT OF THE DISTRICT OF COLUMBIA
 IN RE: [illegible]
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OF THE DISTRICT OF COLUMBIA

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IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Washington, D.C., this [illegible] day of [illegible] 19[illegible].

PRESIDING

MR. JUSTICE McREILAN SPECIALLY CONCURRING:

I agree with the conclusion reached by the majority of the court, but not in what is stated in the opinion in reference to the case of Baltimore & Ohio R. Co. v. Goodman. The law as announced by our Supreme Court governs the instant case, and the decision of that court in Greenwald v. Baltimore & Ohio R. Co., in my judgment, controls the present appeal. The opinion in Baltimore & Ohio R. Co. v. Goodman was handed down at the October term, 1927, and the opinion of our Supreme Court in the Greenwald case was handed down at the December term, 1928, but it will be noted that our Supreme Court did not see fit to cite with approval the former case, although it appears from the opinion that that case was called to the attention of the court. In its opinion the court states (p. 633):

"Appellant complains that the Appellate Court cited as controlling authority the case of Baltimore and Ohio Railroad Co. v. Goodman, 48 Sup. Ct. 44 (1925 Supreme Ct. Rep. 64), and other cases, as binding in the case, and argues that such cases do not state the rule obtaining in this State. This court reviews the judgment of the Appellate Court and not the reasons given therefor, and under the rule in this State, as hereinbefore stated, we are convinced that appellant's evidence does not show due care on the part of his servants in crossing the tracks."

From this language it is reasonably clear, in my judgment, that our Supreme Court refused to approve the rule announced by the United States Court. Our Supreme Court, in refusing a certiorari in Goodman v. Chicago & Eastern Ill. R. Co., did not thereby approve that part of the opinion of the majority of the Appellate Court in that case wherein the ruling in Baltimore & Ohio R. Co. v. Goodman was quoted with approval, for the reason that, regardless of the question as to whether or not the Appellate Court erred in following the ruling of the United States Court, the judgment of the Appellate

READING

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The first part of the book is devoted to a general survey of the history of the English language. It begins with a chapter on the prehistoric period, which deals with the languages spoken in Britain before the arrival of the Romans. This is followed by a chapter on the Old English period, which covers the time from the arrival of the Anglo-Saxons in the fifth century to the end of the eleventh century. The third chapter deals with the Middle English period, which extends from the end of the eleventh century to the end of the fifteenth century. The fourth chapter covers the Modern English period, which begins in the sixteenth century and continues to the present day. Each of these chapters contains a detailed account of the changes in the language over time, and includes examples of the language as it was used in different periods.

The second part of the book is devoted to a study of the grammar of the English language. It begins with a chapter on the parts of speech, which deals with the different classes of words in the language. This is followed by a chapter on the sentence, which discusses the different types of sentences and the rules governing their construction. The third chapter deals with the paragraph, which discusses the different types of paragraphs and the rules governing their construction. The fourth chapter covers the essay, which discusses the different types of essays and the rules governing their construction. Each of these chapters contains a detailed account of the grammar of the English language, and includes examples of the language as it was used in different periods.

Court was clearly right. In this last case Mr. Justice O'Connor, while concurring in the judgment of the court, stated, as his opinion, that Baltimore & Ohio R. Co. v. Goodman went too far and was not in accord with the law of this State. I agree with his conclusion in that regard.

File

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34110

F. L. WEINBERG,
Appellee,

v.

U. S. LEATHER GOODS CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

258 I.A. 616

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced May 18, 1929, there was a trial without a jury in October, 1929, resulting in the court finding the issues against defendant and assessing plaintiff's damages at the sum of \$4,000. Judgment on the finding was entered against defendant and the present appeal followed.

Plaintiff alleged in his statement of claim that defendant was a manufacturer and jobber in Chicago of leather goods; that about March 21, 1927, it employed plaintiff as its sales manager at an agreed salary; that during April, 1927, a verbal agreement was made between the parties to the effect that if defendant's jobbing business for the calendar year of 1927, showed an amount of \$50,000 in gross sales, plaintiff was to receive in addition to his salary "a bonus of \$5,000;" that during the month of May, 1927, it "became apparent to defendant" that said gross sales would exceed \$50,000 for the calendar year of 1927, "whereupon defendant advanced to plaintiff \$1,000 to apply on said bonus;" that plaintiff continued in defendant's employ and received his salary until the end of the year, 1927; that the gross sales in defendant's jobbing business for that year amounted to more than \$50,000; and that defendant, although often requested, has not paid to plaintiff the balance of \$4,000, which is due to him.

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It is a fact that during the past few years, the United States has been engaged in a policy of containment of Communism. This policy has been based on the assumption that Communism is a threat to the free world and that it must be stopped. The United States has been successful in this policy, and it is now the responsibility of the United States to continue this policy. The United States must continue to support the free world and to oppose Communism. The United States must continue to be a leader in the world and to be a force for good. The United States must continue to be a force for peace and to be a force for justice. The United States must continue to be a force for freedom and to be a force for hope. The United States must continue to be a force for the future and to be a force for the world.

Defendant, in its amended affidavit of merits, denied that it was indebted to plaintiff in any sum. It admitted plaintiff's employment on a salary as its sales manager, but it denied that during April, 1927, or at any other time, it made any agreement to pay him a bonus, or any sum in addition to his salary, or that it advanced to him at any time the sum of \$1,000 to apply on the alleged bonus.

It appears from the evidence that during the entire year of 1927 one Olaf Halvorsen was president of defendant; that he on its behalf employed plaintiff in March, 1927, to act as its sales manager at a salary of \$85 per week and an allowance of \$15 per week for expenses (a total of \$100 per week); and that plaintiff received the salary, etc., until December 30, 1927, when he was discharged by Halvorsen. The bill of exceptions discloses that at a time considerably prior to the commencement of the present suit Halvorsen brought a suit in the municipal court against Weinberg (plaintiff herein) to recover back \$1,000, which he claimed he had personally loaned to Weinberg in May, 1927, and that, by agreement of all parties, the two suits were tried together before the same judge, - Halvorsen to first introduce evidence on the issues in his suit against Weinberg and "the evidence in the one suit to stand as evidence in the other." It is not disclosed in the present transcript what was the outcome of the Halvorsen suit.

The main issues of fact in the present suit are whether in April, 1927, or at any time, defendant agreed to pay a bonus of \$5,000 to plaintiff in the event the gross sales of defendant's jobbing business exceeded \$50,000 for the year, and whether in May, 1927, defendant advanced to plaintiff \$1,000 to apply on such a bonus. Plaintiff's uncorroborated testimony was to the effect that defendant, by Halvorsen, made such a verbal agreement with

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him, and also made such an advancement. Halvorsen's testimony was directly to the contrary, and it is corroborated in an important particular by a certain receipt signed by plaintiff. It appears that in May, 1927, plaintiff negotiated with one W. B. Johnson, a seller of automobiles, for the purchase for his personal use of a Willys-Knight car at the price of \$2,300, and agreed with Johnson to pay \$1,000 down and the balance by notes secured by chattel mortgage. According to plaintiff's testimony he did not have the funds to make the first payment and he applied to Halvorsen for assistance, and the latter gave him a check for \$1,000, and the purchase was made. He further stated that when he received the check from Halvorsen there was talk about the amount being considered as an advancement on the probable bonus that he (plaintiff) would receive from defendant at the end of the year. Halvorsen, as to this conversation and transaction, testified that about May 25, 1927, plaintiff asked him for a loan of \$1,000, for the purpose of making the first payment on the automobile; that out of his (Halvorsen's) own funds he loaned him the money - giving him a check for \$1,000; that nothing was said at the time about an advancement or any bonus; but that plaintiff then signed and delivered to him the following receipt, (introduced in evidence and dated May 25, 1927): "Received of W. Halvorsen \$1,000 (One Thousand and no/100 Dollars) as loan against Willys Knight Car." On the trial, also, certain of defendant's books were brought into court, and, after some examination of them by the attorneys, it was stipulated that for the calendar year of 1926, defendant's total sales in its jobbing business amounted to \$55,642; that for the calendar year of 1927 they amounted to \$68,125; and that for the first five months of said year (including May, 1927) they amounted to \$10,111.

After a careful review of the present transcript we are of the opinion that the court's finding is clearly against the

weight of the evidence, and that the judgment against defendant should be reversed with a finding of facts.

REVERSED WITH FINDINGS OF FACTS.

Scanlan, P. J., and Barnes, J., concur.

(34110)

FINDINGS OF FACTS.

We find as facts in this case that defendant, U. S. Leather Goods Co., did not in April, 1927, or at any time, agree with plaintiff to pay to him a bonus of \$5,000, or any other sum as such, in the event the gross sales of defendant's jobbing business for the calendar year, 1927, exceeded \$50,000; and that the \$1,000 which plaintiff received in May, 1927, from the witness, Halvorsen, was not an advancement by defendant to apply on said claimed bonus, but was a loan from Halvorsen, individually, to plaintiff.

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34119

ALFRED L. REESE and
ADA K. REESE,
Complainants and Appellises,

v.

JAMES W. MCCORMACK, J. W.
MCCORMACK CO., Inc., and
CHICAGO TITLE & TRUST COMPANY,
Defendants.

JAMES W. MCCORMACK and
J. W. MCCORMACK CO., Inc.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2581A 616²

MR. JUSTICE SWINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by two defendants (James W. McCormack and J. W. McCormack Co., Inc.) from a decree of the Superior court, entered December 13, 1929, wherein it was adjudged that the written contract for the sale of certain real estate in Cook county, dated December 16, 1926, and signed by "TRUSTEES COMMITTEE TO BOULEVARD MANOR REALTY TRUST (of which Chicago Title & Trust Company is trustee)," by J. W. McCormack, Manager, as first party, and by Ada K. Reese (one of the complainants), of Michigan City, Indiana, as second party, "was procured by the aforesaid false and fraudulent representations, and is hereby annulled, set aside and for naught set aside;" that the two defendants deliver up the contract within 30 days to be cancelled by the clerk of the court; that the complainant, Alfred L. Reese, have and recover from said defendants the sum of \$2,000, with legal interest thereon from December 16, 1926, together with costs, and that he have execution therefor as at common law; and that, as further security for the payment of the sum, said complainant "have a lien on the above described real estate for said amount," - the court reserving jurisdiction for the enforcement of the lien.

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct copy
of the original as the same appears from the records
of the said office.

IN WITNESS WHEREOF

I have hereunto set my hand and the seal of the
said office at the City of Washington, this 1st day of
January, 1901.

JOHN W. HARRIS, Secretary of the Interior.
By _____, Deputy Secretary of the Interior.

That in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the eighty-fifth, on the first day of January, at the City of Washington, in the District of Columbia, I, John W. Harris, Secretary of the Interior, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the said office.

In testimony whereof, I have hereunto set my hand and the seal of the said office at the City of Washington, this 1st day of January, 1901.

JOHN W. HARRIS, Secretary of the Interior.
By _____, Deputy Secretary of the Interior.

Complainants are husband and wife. In their bill, filed October 2, 1928, they prayed for substantially the same relief as decreed by the court. In January 22, 1929, the three defendants filed an answer, to which complainants filed a replication. In December, 1929, there was a hearing in open court before the chancellor at which both complainants testified and six witnesses for them. Defendant James F. McCormack testified for defendants, as did three other witnesses for them. Both parties introduced certain documentary evidence.

In the decree the court found that on February 15, 1926, James F. McCormack (hereinafter called McCormack) conveyed certain real estate in Cook county to the Chicago Title & Trust Co. (hereinafter called the Trust Co.) as Trustee, for certain purposes and in trust as stated in a written agreement of the same date; that by the agreement the Trust Co. was to hold the land "for subdivision into lots" and McCormack was to have the right to sell any and all lots and collect and receive moneys from purchasers on sales or contracts for sales, and individually retain a certain percentage of the receipts from sales, etc. And the court made further findings which are amply sustained by the evidence, as follows:

That thereafter McCormack and the McCormack Co. engaged in the selling to the public of various lots in the subdivision, and for the purpose of promoting sales had in their employ salesmen, including one George Mitchell and one William Pruitt, who were "authorized to represent them in effectuating sales for them of the real estate and to make representations as herein-after set forth;" that during and prior to the month of December, 1926, the two defendants, by Mitchell and Pruitt, urged Alfred L. Beese (one of the complainants) to purchase lots 18 and 19 in Block 7 in the subdivision, and represented to him that the lots were a part of the estate of former United States Senator Medill McCormack, and were then owned by his relatives; that many lots in Block 7, as well as in other blocks, had already been sold and substantial business buildings or residences erected thereon; that "a street car line was then in operation on frequent schedule" in front of said lots, and they were "in close proximity to a suburban passenger station of a steam railroad and a few minutes ride from the loop district of Chicago;" that they "were on a through street and in the city of Chicago;" that they "had lately

been contracted for by a business man at a fancy price she had not kept his contract;" that "all street, alley, sewer, gas and electric light improvements were completed and the two lots were situated next to one of the corners of the block and were choice lots;" and that, "by the immediate payment of \$2,000 and no more." Reese "could procure an assignment of said contract for the purchase of the lots," and defendants "could resell the same for him before March 1, 1927, at a profit to him," etc.

That said representations "were statements relating to the real estate and made for the purpose of influencing Alfred L. Reese to pay the sum of \$2,000 to the two defendants;" that they "were untrue and known to be untrue by the agents and were material statements in the transaction and were believed to be true by Reese;" that he had no knowledge or information as to the real estate except the foregoing and he resided at a long distance therefrom; and that "he did not personally investigate the premises at the request of said agents so not to do."

That Reese, relying upon the representations, did, out of his own funds on December 16, 1926, pay to the defendants, McCormack and the McCormack Co., the sum of \$2,000; that thereafter McCormack, by the name and description of "Fourth Addition to Boulevard Manor Realty Trust of which Chicago Title & Trust Co. is trustee," executed and delivered to Ada K. Reese a contract for the conveyance of the two lots upon the payment of \$8,000, - reciting that \$1600 had been paid and that the balance was to be paid in monthly installments of \$80; that as a matter of fact Ada K. Reese had not theretofore paid \$1600, and did not have any interest in the \$8,000 paid by Alfred L. Reese; that prior to the filing of the present bill complainants fully informed McCormack as to the false representations and requested the return of the \$2,000, but that he, contrary to equity and good conscience, refused and still refuses to make such return; that complainants, within a reasonable time of their discovery of the falsity of the representations, filed the present bill; and that the equities of the suit are with them.

It further appears from the evidence that during the year 1926 Alfred L. Reese was the owner of certain encumbered land and improvements on the Jones' Highway, near Michigan City, Indiana; that with the assistance of his wife he there conducted a roadside restaurant and filling station; that Mitchell during the spring and summer frequently stopped there for lunches, gasoline, etc., and became well acquainted with both complainants; that about August, 1926, Mr. Reese became blind and seriously ill, and for several months thereafter was confined to his bed, during which time Mrs. Reese conducted the business; that during the fall Mitchell several times visited Reese in his room, conversed with him, expressed the desire to do something for him, and gradually gained his con-

fidence, so much so that Reese talked with Mitchell about his business and financial affairs; that Reese told him that there was a mortgage of about \$2,000 on the property, maturing in March, 1927, and that he had accumulated savings of about \$2,000 for the purpose of paying off the mortgage; that Mitchell thereafter frequently urged him to purchase the two lots with his \$2,000, saying that the lots could be resold at a profit of more than \$1,000 before the mortgage became due, etc.; that during November and the early part of December, 1926, Mitchell continued his calls and on several occasions Fruity accompanied him; that both made the representations as mentioned in the court's findings as above; and that finally on December 16, 1926, Reese was induced to part with the \$2,000. After he became blind it was arranged that the funds on deposit in a Chicago bank could be drawn out by check signed by Mrs. Reese. And on December 16th she, at his request, signed a check drawn on said bank for \$2,000, payable to the order of "J. M. McCormack," and the same was delivered to Mitchell. The check was introduced in evidence. It is endorsed by both McCormack and the McCormack Co. and is stamped as having been paid on December 13, 1926. During one of the conversations had prior to December 16th Reese suggested that his wife had better go and view the property, but both Mitchell and Fruity said that such a trip was unnecessary for the reason that the property would soon be resold at a profit to Reese. A few days after the check had been delivered and cashed, Fruity again called, bringing a receipt for the \$2,000, signed by Mitchell, in which it was stated that the transaction was subject to the approval of "J. M. McCormack, manager." About three weeks later Fruity again called and left a contract with Reese. It is on a printed form, dated December 16, 1926, and is signed and contains the provisions as found in the court's decree as above stated. It contains the further provision that "the second party (Ida K. Reese)

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represents to the first party that no representations of fact have been made to or relied upon by the second party other than those set forth in this contract." During the summer of 1927, Otto Reese, a brother of Alfred, an attorney named Tompkins, and also Mrs. Reese, severally interviewed McCormack and urged that he return the \$2,500 to Reese, but he refused to do so, stating that if any false representations were made by his agents, Mitchell and Fruity, they were made without his knowledge or authority or that of the McCormack Co. Neither Mitchell nor Fruity testified at the hearing.

After reviewing the present transcript we are of the opinion that the court's decree is fully sustained by the evidence and the law. Counsel for appellants first contend that, inasmuch as there was some evidence that the lots in question were worth \$8,000 at the time of the trial, complainants have not shown that they have sustained any substantial loss by reason of the false representations which induced them to pay over the \$2,500. In view of all the facts and circumstances in evidence, we think it clear that complainants should, as far as possible, be restored to their original status by the return of the money. (Mitchell v. McLaughlin, 32 Ill. 493, 506; Baker v. Dockstader, 113 Id. 363, 373; Morgi v. Basalski, 333 Id. 41, 46.)

Counsel also contends that, granting that false representations were made by Mitchell and Fruity upon which Reese relied as shown by complainants' testimony, still there should be no recovery from the two defendants, because it does not sufficiently appear that they authorized said representations or had any knowledge of them. We do not think there is any merit in the contention. In the case of Bennett v. Judson, 31 N. Y. 238, there was no evidence that the defendant authorized or knew of the fraud committed by one of his agents in negotiating an exchange of certain lands, but the

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

In the second part of the paper, the author discusses the various theories of the origin of life. He begins with the theory of spontaneous generation, which was the dominant theory of the origin of life until the middle of the nineteenth century. He then discusses the theory of biogenesis, which was proposed by Louis Pasteur. Finally, he discusses the theory of abiogenesis, which is the theory that life arose from non-life through a series of chemical reactions.

The author concludes his paper by stating that the problem of the origin of life is still an open question. He believes that further research is needed to determine whether life is a necessary part of the universe or whether it is a mere accident. He also believes that the study of the origin of life is important for our understanding of the universe and our place in it.

court held that, nevertheless, he could not enjoy the fruits of the bargain "without adopting all the instrumentalities employed by the agent in bringing it to a consummation" and further said (p. 239): "If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution; but so long as he retains the benefits of the dealing, he cannot claim immunity, on the ground that the fraud was committed by his agent and not by himself." The same principles are recognized in the equity case of Hopkins v. Snodaker, 71 Ill. 449, where rescission of a contract for the exchange of certain lands and the making of restitution were decreed, because of false and fraudulent representations made by an agent. The court said (p. 463): "They reaped the fruits of the fraudulent representations made by their agent, and, to the extent that they derived a benefit therefrom, we see no objection to their being required to respond."

Equally without merit, in our opinion, is counsel's further contention that no recovery should have been decreed because of the provision of the contract, signed by Mrs. K. Moore, to the effect that no representations of fact had been made to her, or relied upon by her, other than as mentioned in said contract. We concur in what was said in the opinion in the case of Miller v. Hydick, 234 Ill. 524, 537, as follows: "To hold that one who by fraudulent representations procures the signature of another to a contract will be immune from a suit to rescind the same, because the contract which itself was obtained by fraud states that no fraudulent representations were made, would paralyze the arm of a court of equity. Such is not the law." (See, also, Harper v. Sabst, 149 Wis. 35, 47.)

Counsel further contends that the decree should be reversed

because it appears that complainants were negligent in not viewing the property before parting with the \$5,000 and before entering into the contract. It is not disputed that the property was in a State other than that in which complainants resided, that Alfred E. Reese was blind and seriously ill, that he relied implicitly and solely upon the representations of Mitchell and Fruity, and that they, as agents of defendants, stated that it was not necessary for anyone to view the property. Under these and all the other circumstances in evidence, we do not think that appellants are in any position to urge as a defense negligence on the part of complainants. In Moral v. Maszlaki, 333 Ill. 41, 46, it is said: "The general rule is that a party guilty of fraudulent representations will not be permitted to charge negligence of the other party." (See, also, Gilbey v. Maslin, 397 Ill. 358, 363.)

For the reasons indicated the decree of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

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DEFENDANT INDUSTRIAL COMPANY,
Incorporated,

Appellee,

v.

U. S. REDUCTION COMPANY,
a corporation,

Appellant.

CENTRAL CHAM MUNICIPAL

COURT OF CHICAGO,

3581A 616³

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$750, rendered against it after verdict on December 13, 1939, in an action for damages for breach of warranty on four of five machines sold by it.

In plaintiff's amended statement of claim it is alleged that on August 26, 1936, plaintiff in writing ordered from defendant four (4) Sperry filter presses, complete with wooden plates and frames and guaranteed by defendant to be in good condition, and one Tolhurst steel basket extra size, at the price for all five machines of \$2,000, f.o.b. cars, East Chicago, Indiana; that on September 1, 1936, defendant in writing accepted the order and a payment by plaintiff of \$200 on account and expressly warranted that the machines were in first class condition; that plaintiff purchased them for the purpose of reselling them; that subsequently it resold the four presses for \$1500 to the American Milling Products Co., and ordered the same shipped by defendant to it, which shipment defendant made; that the presses were not as warranted in that the plates and frames were rotted and warped, and were not in first class condition; that when received the Products Co. rejected them for this reason; that on October 15, 1936, plaintiff notified defendant of their defects and of said rejection and requested defendant to accept their return but it refused; that subsequently plaintiff sold them for \$1120.

The first part of the report deals with the general situation of the country. It is a very interesting and detailed account of the political and social conditions. The author has done a great deal of research and has gathered a wealth of material. The second part of the report is a study of the economic conditions. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The third part of the report is a study of the cultural conditions. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material.

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which was the best price it could obtain for them; and that thereby and because of defendant's breach of warranty it has suffered damages to the amount of \$1327. - the same being the difference between the price at which plaintiff sold them to the Products Co., \$2,500, and what it actually received for them.

In defendant's affidavit of merits, made by Henry Lindenberger, its president, it admitted the order and purchase of the five machines at the price of \$2,000 and the full payment by defendant of the price. It alleged that, prior to the purchase, an authorized agent of plaintiff "had inspected the presses," which were not then in use but were stored in defendant's plant. It denied that it ever had any knowledge that plaintiff was purchasing the presses for resale, or that the plates and frames were rotted and warped and not in good condition.

On the trial portions of the depositions, taken in New York city, of four witnesses for plaintiff were read, and said Lindenberger was called as plaintiff's witness under section 31 of the Municipal Court Act. Lindenberger and four other witnesses testified for defendant, and both parties introduced various letters and writings.

The following facts in substance appear from the oral and written evidence introduced by plaintiff: Plaintiff's business, with principal office in New York city, was the buying and selling of machinery and machinery equipment. Merely before August 1, 1926, plaintiff's agent, Herman Kohn, called at defendant's plant at East Chicago, saw Lindenberger, said that plaintiff was in the business of buying and selling any kind of machinery and asked Lindenberger if defendant had any machinery for sale. Lindenberger replied that it had on hand the five machines which it had recently purchased but which it was not then using, and that it was willing to sell them. Kohn then asked if he could inspect them. Lindenberger

replied that inspection could not then conveniently be made but that the machines were complete and in A-1 condition and that defendant could guarantee the numerous wooden plates and frames as being in first class condition. There was some talk about price, but Lindenberger said he could not then quote a definite price.

On August 3, 1926, plaintiff, per Kahn, wrote from New York to defendant, asking if it was then in a position to quote a price on the five machines, and defendant replied quoting \$2500. Further letters and telegrams passed between the parties relative to the sizes, condition and price of the machines, and on August 26th, plaintiff wired defendant: "Sending our formal order for four 42 inch Sperry presses and one 48 inch Polhurst complete; price \$2,500 f.o.b. cars." On the same day plaintiff wrote defendant, enclosing written order and its check for \$200 (being 10% of the price), and saying that it would forward shipping directions within 10 days. The order is for the four Sperry presses "each complete with wooden plates and frames, guaranteed in good condition." and for one Polhurst extractor complete, also so guaranteed; the price stated is \$2,500, "f.o.b. cars, West Chicago;" and the terms are, 10% (\$250) herewith, "20% with shipping instructions, and balance eight draft with 3/L." To this letter and order defendant replied under date of September 1st: "We beg to acknowledge your letter of August 26th, also your order for the presses and extractor, together with your check for \$200 to apply on this purchase. The machinery is in first class condition and is ready for shipment whenever desired." Subsequently plaintiff resold the presses to the American Canline Products Co., at Lockhaven, Pa., for \$2500, and on September 17th advised defendant of such resale, gave shipping directions, and enclosed its check of \$600. By subsequent correspondence it was arranged that plaintiff would pay the balance of the purchase price (\$1900) on presentation of draft and bill of

loading. Early in October defendant shipped the presses as directed and plaintiff paid the draft of \$1300. On the arrival of the presses at the plant of the Products Co. it was found upon inspection that many of the numerous wooden plates and frames were rotted and warped and unfit for use, and the Products Co. immediately wired plaintiff that the presses were rejected on this account. On the same day (October 13th) plaintiff advised defendant of the facts and demanded that defendant either "accept a return of the presses or pay for the cost of replacing the defective plates and frames with new ones." Considerable correspondence between the parties followed, but finally defendant, by its letter to plaintiff of November 3, 1926, refused to do either, stating: "We have nothing further to say in regard to your complaint, only that we shipped what your representative inspected, and, as the machinery you purchased has been shipped and paid for, we therefore consider the matter closed."

Plaintiff's evidence further disclosed that following defendant's said refusal, it entered into negotiations with the Products Co. which resulted in that company agreeing to accept the four presses at said original price to it of \$2800, less the cost of making the necessary repairs to put them in the first class condition as had been represented, - said repairs to be made by the Products Co. in its own plant. Thereupon, after inspection, agents of the Products Co. estimated the cost of making such repairs at \$1320, which estimate was accepted by plaintiff as being a reasonable one, and on November 28, 1926, it resold the presses to the Products Co. for the difference, and the latter paid to plaintiff the sum of \$1120. Subsequently the Products Co. made the necessary repairs at the total cost of about \$1320. This is known by certain written evidence introduced by plaintiff and by the depositions of its witnesses, Glahn and Weber, employees of the Products Co. Weber's undisputed testimony is to the effect that the reasonable cost of repairing or replacing all

of the defective plates and frames was about \$700 (the amount of the verdict). He further testified that, while the iron parts of the presses were in good condition, there "were no gear closing devices" on any of the presses, and that the cost of supplying them amounted to about \$570. The jury did not allow this last mentioned sum as proper damages to be charged against defendant, and we think this action was proper, especially in view of plaintiff's statement of claim, limited as it is to the defective plates and frames.

Defendant's main defenses on the trial were that, when it made its contract with plaintiff for the sale of the five machines, it did not have any knowledge that plaintiff was purchasing them for resale, and that although it warranted the plates and frames of the four presses to be in good condition, plaintiff, by its agent, Kahn, had, prior to the making of the contract of sale, inspected the presses and the plates and frames and knew of their condition, and made the purchase with that knowledge. Defendant's principal witness was said Hindenberger, its president, and, while he gave testimony tending to support these defenses, we think it clearly appears from a preponderance of the evidence that defendant, at the time of the contract, knew that plaintiff was purchasing the machines for resale; that plaintiff, when it made the purchase, relied solely upon defendant's warranty; and that about August 1, 1926, when Kahn was at defendant's plant, he could not have made and did not make any proper inspection of the presses or the numerous plates and frames thereof.

After reviewing the present transcript we are of the opinion that the verdict and judgment are sufficiently sustained by the evidence and the law. In Malan v. Andrews, 82 Ill. 486, 490, it is decided in substance that, in a suit to recover damages for a breach of warranty, the plaintiff is entitled to recover for all damages which are the natural and proximate result of the

Failure of the warranty. (See, also, Illinois Uniform Sales Act, Chap. 121a, sec. 53, par. 3; Wright v. Marshall, 10 Ill. 437, 441; Boasbach v. Lincolnton Motor Car Co., 173 Ill. App. 558, 561; Stayer Carriage Co. v. American & British Mfg. Co., 183 Ill. App. 634, 642.) Numerous other points are made by defendant's counsel as grounds for a reversal of the judgment. We have considered them but think them lacking in substantial merit.

The judgment of the Municipal court should be and is affirmed.

AFFIRMED.

Scanlan, F. J., and Barnes, J., concur.

34137

JACOB I. GLICKERMAN, trading
as Independent Plumbing &
Heating Co.,
Complainant and Appellee,

v.

McKAY & ROBBINS, Inc., now known
as F. W. McKay & Co., a corporation,
et al.,
Defendants,

ON APPEAL OF FRANK C. VOISINET,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2561A. 6164

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

We are informed from the printed brief and argument of appellant's counsel that the present appeal is taken from a decree of the Superior court, entered November 29, 1926, awarding complainant a mechanic's lien upon certain real estate in Cook county for \$77. together with interest at 5 per cent per annum from April 26, 1924, and that, if the amount, together with costs, etc., be not paid within three days, the premises be sold, etc. Counsel state in substance that complainant's original bill praying for the lien as an original contractor was filed on February 14, 1926; that Voisiniet answered the bill on December 19, 1927; that on October 3, 1928, complainant filed an amended bill which was put at issue, - Voisiniet's answer thereto being filed on October 13, 1928; that subsequently a master in chancery, to whom the cause had been referred to take proofs and report his conclusions of law and fact, filed a report together with a transcript of the evidence taken before him; that the master made certain findings, concluded the complainant was not entitled to a lien because he did not file

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his original bill "within the two-year statutory period," and recommended that the bill be dismissed for want of equity; that subsequently the court sustained complainant's exceptions to the master's report, made contrary findings and entered the decree in question.

As grounds for a reversal of the decree counsel contend (1) complainant failed to prove that the last plumbing work he did on the premises was done on or after February 14, 1934. (i.e., at a time less than two years prior to the time his original bill was filed); (2) certain persons, including Voisinnet, having interests in the premises, were not specifically made defendants to the bill except under the appellation of unknown owners, etc.; and (3) that the original bill was faulty in that it did not properly allege that the plumbing material and labor, furnished by complainant, enhanced the value of the premises to the extent of \$770.

Turning to the so-called "Abstract of Record," prepared and here filed by appellant's counsel, we find that in many essential particulars it is a mere index and not an abstract. It violates Rule 13 of this court in that it is not "a complete abstract or abridgement of the record;" does not "show, in condensed form, the pleadings necessary to present any question raised thereon;" and is not "sufficient to present fully every error and exception relied upon." Complainant's original bill is not abstracted at all, although the date of its filing is stated; there is no abstract whatever of Voisinnet's answer to said original bill; while certain evidence heard before the master is abstracted in abbreviated form, the master's report as to his findings and conclusions is not abstracted at all; none of the writings introduced before him as exhibits are abstracted, but only the exhibit number is given as well as the page of the record where said exhibit may be found; none of complainant's objections or exceptions to his

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report are abstracted; and the court's decree appealed from is not abstracted, it only appearing that said decree may be found commencing at page 140 of the transcript.

Because of the above insufficiencies of the abstract we think that under numerous decisions the decree should be affirmed. (Bishop v. Loewig, 45 Ill. 351, 352 and cases there cited; Chamberlin v. Gary, 47 Ill. App. 542, 543; Allen v. Henn, 97 Ill. App. 373, 390; Love v. Dick, 177 Ill. App. 98, 100, and cases there cited; Kohonen Nat. Bank v. Olmora, 201 Ill. App. 242, 243.) In the case last cited it is decided in substance that courts of review will never go to the record to discover errors not shown by the abstract, but will inspect it to find reasons to affirm.

We have, however, examined into the record to some extent. As regards counsel's first contention, we discover that the court found in the decree that complainant's "first labor and material was furnished on April 10, 1923, and that the last of said work was completed on April 25, 1924," and that this finding is sustained by a clear preponderance of the evidence. And after further examination into the record we do not think that there is such substantial merit as warrants a reversal of the decree in either of counsel's ^{other} contentions above mentioned.

The decree of the Superior court should be affirmed and it is so ordered.

ATTEST.

Bennett, P. J., and Barnes, J., concur.

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

The second part of the report deals with the financial aspects of the work. It gives a detailed account of the income and expenditure of the organization and shows how the funds have been used. It also includes a statement of the assets and liabilities of the organization at the end of the year.

The third part of the report deals with the personnel of the organization. It gives a list of the staff and their duties and shows how they have contributed to the work of the organization. It also includes a statement of the salaries and other benefits paid to the staff.

The fourth part of the report deals with the other work of the organization. It gives a list of the various projects and the results achieved. It also includes a statement of the income and expenditure of these projects.

The fifth part of the report deals with the future plans of the organization. It gives a list of the projects and the results achieved. It also includes a statement of the income and expenditure of these projects.

34146

2747 MILWAUKEE AVENUE BUILDING
CHICAGO, ILL.,

Appellee,

v.

SEN E. HIRSH,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

256 I.A. 616⁵

MR. JUSTICE CHILKEY DELIVERED THE OPINION OF THE COURT.

On November 3, 1929, plaintiff commenced an action in forcible detainer against defendant, claiming that he was unlawfully withholding from it the possession of the "ground floor of the building known as 2747 Milwaukee Avenue, Chicago." A trial was had on November 18th, without a jury, resulting in a finding and judgment against defendant. On November 13rd defendant moved that the judgment be vacated, and subsequently the court ordered it vacated, and allowed additional evidence to be introduced. Finally, on December 3, 1929, the court made a new finding against defendant and adjudged that plaintiff recover from him the possession of the premises and that a writ of restitution issue. The present appeal followed, - defendant filing an appeal bond in the sum of \$5000.

The evidence discloses the following facts: By written lease, dated May 1, 1928, plaintiff demise the premises, for a juvenile wearing apparel shop, to defendant for the term from June 1, 1928, to April 30, 1933, at a rental payable in certain specified installments as plaintiff's of 1cc, "134 W. La Salle Street." The lease, partly printed and partly in typewriting and signed by the parties, contains the usual covenants. It was stipulated on the trial that about May 1, 1929, (one year after the making of the lease) plaintiff ceased having an office at "134 W. La Salle Street," where

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by the terms of the lease the monthly rental was payable. Thereafter Harry Lanski, president of plaintiff, had offices at No. 105 W. Madison street, where he was engaged in a real estate business. Up to and including the month of October, 1929, defendant had paid all accused rent; sometimes he had paid it to a Mrs. Carson who had an office in the building and who was in charge thereof and had the management, as plaintiff's agent, of the apartments above the store; sometimes he had paid it at Lanski's said office; and on several occasions he had paid it as late as the 30th of the month, and no objections had been made that it had not been paid on the first day of the month as provided in the lease. The rent for September, 1929, was paid by defendant's check and receipted for on September 16th when Mrs. Carson called at defendant's store to collect it. The rent for October was paid and receipted for at Lanski's office. On October 11, 1929, an attorney for plaintiff sent a registered letter to defendant at the store, informing him in effect that plaintiff desired that the rent be paid promptly in the future, and "you are hereby advised that, commencing with November 1, 1929, you will be held to strict compliance with all of the terms and obligations of the lease, * * and your rent will be due and payable not later than the first day of each and every month; * * and no checks of any kind will be accepted for said rent." The letter did not mention any particular place where the rent was to be paid in the future. On Monday morning, November 4, 1929, defendant tendered the November rent in currency to Mrs. Carson at her office in the building but she refused to accept it. This was four days before the present action was commenced, and before any declaration of attempted forfeiture of the lease had been made by plaintiff. Mrs. Carson's testimony was to the effect that this tender in currency was not made until November 11th, but defendant's testimony that it was made on the

4th is corroborated by other witnesses. On November 13, 1929, defendant personally tendered in currency the amount of the November rent to Abraham Lasaki, at said Harry Lasaki's office at 105 W. Madison street, but it was refused. This was one day before defendant was served with summons in the present suit. On the same day (November 13th) defendant wrote plaintiff, "c/o Harry Lasaki, 105 W. Madison Street, Chicago" to the effect that he had tendered the November rent, etc., and that he was ready, able and willing to pay it at any time, etc. The amount (\$230) was also tendered in currency upon the trial and refused by plaintiff.

After considering all the facts and circumstances in evidence we are of the opinion that defendant was not guilty of unlawfully withholding the possession of the premises from plaintiff and that the judgment for possession in its favor must be reversed. We think it clearly appears that defendant properly tendered to plaintiff the amount due for the November, 1929, rent, prior to plaintiff's attempted forfeiture of the lease, and prior to the time of the commencement of the present action.

REVEREND WITH FINDING OF FACTS.

Scanlan, F. J., and Barnes, J., concur.

34146

FINDING OF FACTS.

To find as facts in this case that the defendant, Hise, did not unlawfully withhold possession of the premises in question from plaintiff, and that the right to such possession is not in plaintiff.

34155

FRISCILLA A. GAIRING, executrix
of the last will of Carl F.
Gairing, deceased,
Appellee,

v.

W. J. BERNHEIM BRICKING CO.,
a corporation,
Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

258 I.A. 617

MR. JUSTICE GRIMES DELIVERED THE OPINION OF THE COURT.

In an action of trespass, commenced by Carl F. Gairing in his lifetime on January 30, 1928, and in which Friscilla A. Gairing, executrix of his last will, was substituted as plaintiff, there was a trial before a jury in October, 1928, resulting in a verdict and judgment against defendant for \$450. The present appeal followed.

In plaintiff's declaration as amended it is alleged that on November 14, 1927, Carl F. Gairing, was a tenant in the Marine Building, on the northeast corner of Lake and La Salle streets, Chicago; that he occupied rooms, numbered 310, on the third floor of the building, where he had been engaged for about three years in the business of commercial photography; that on said day, while there engaged in his business, defendant, by its servants, without notice or warning to him, "with force of arms, carelessly, wilfully, wantonly and maliciously broke into and entered said rooms, * * and did * * break, injure, damage and ^{certain} spoil cameras, lenses and other photographic materials and supplies," belonging to him, all of the value of \$400; that by reason thereof he was compelled to and did purchase other cameras, lenses, etc., at a cost of \$200; and that he was otherwise damaged, etc.

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Defendant filed a plea of not guilty and several special pleas, two of which (relied upon at the trial) are (a) that on said day Gairing "was a trespasser in and upon the premises wrecked, and defendant was in possession thereof and engaged in wrecking them under and by virtue of its contract with the then owner thereof, the City of Chicago," and that defendant exercised all due care and caution in wrecking the premises so as not to injure Gairing's property; and (b) that, before said day, the City of Chicago had filed a condemnation suit in the County Court of Cook County to condemn for its use certain real property upon and along La Salle street, and between Washington and Laite streets; that the property sought to be taken included the Marine building; that on June 24, 1926, Gairing was served with summons as a defendant in the condemnation suit, and thereafter she defaulted; that the county court duly adjudged that the City "was entitled to take said property in condemnation upon the payment of \$370,000 therefor, which sum was upon order of said court deposited with the County Treasurer of Cook county, as depository, on November 3, 1927;" that on November 4, 1927, the county court "entered an order of possession, ordering plaintiff's intestate and all other people in the said premises to surrender possession thereof immediately to the City of Chicago;" that all the occupants of the said building surrendered possession to said City, except Gairing; and that "on November 14, 1927, defendant went into possession, under contract with said City, to wreck said premises pursuant thereto." To each of these special pleas plaintiff files a replication.

On the trial plaintiff was the principal witness in her own behalf. She is also the widow of Gairing, and was on November 14, 1927, and prior thereto had been, an assistant in his business in the building. She called as witnesses the engineer

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The fifteenth part of the report deals with the acknowledgments. It is a very interesting and informative account of the state of affairs in the country at the time.

or janitor of the building; a photographer, who made photographs (introduced in evidence) of Gairing's rooms and the building, showing the condition of both about noon on November 14, 1927, and also about a week later; and Walter P. Rupert, the foreman of defendant's men engaged in the wrecking of the building. Rupert also testified as a witness for defendant, and defendant introduced various orders and records of the county court in said condemnation suit.

It will be noticed that plaintiff does not sue for damages sustained by Gairing as to his household estate in the rooms he occupied. It may be conceded that the judgment in the condemnation suit (in which he was made a party and was defaulted), followed by the City's deposit of the condemnation money into court, is a bar to any action for damages for interference by defendant, as the City's agent, with Gairing's possession of the rooms. Allen v. Haley, 149 Ill. 532, 538. Plaintiff's action is for damage to certain of his goods and chattels in the rooms, occasioned as alleged by the willful, wanton and malicious acts of defendant. And on the trial plaintiff's undisputed evidence showed that the extent of the damage amounted to \$600. The jury's verdict was for a less amount, but no cross errors are here assigned.

On the issue as to the willful, wanton and malicious acts of defendant's servants, the evidence discloses the following facts in substance: On Saturday afternoon, November 12, 1927, only two tenants remained in the building, Gairing on the third floor and the "Butter & Egg Market" on the first floor. On that afternoon defendant's foreman, Rupert, called on Gairing and informed him that defendant would commence wrecking the building on Monday morning and that he (Gairing) must vacate his rooms at once. Gairing replied that

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it was impossible for him to do so that afternoon. Without further notice Rupert and defendant's workmen started wrecking the building early Sunday morning and during the morning started ripping up the floors of rooms on the fourth floor just above Gairing's rooms and making holes in the ceilings. Notwithstanding Gairing's protests to Rupert, the workmen continued in the particular work, with the result that much debris and wreckage fell down into Gairing's rooms and onto his goods, etc., causing the damage complained of. The doing of this particular work was stopped about noon by order of an official of the City, and Gairing commenced moving his goods, etc., out of the building and he vacated the rooms on the following day (Tuesday). During Saturday and Sunday the elevator in the building was running and the heat was on. Rupert's excuse for the doing at the time of the particular work which caused the damage to Gairing's goods, was that it is customary in wrecking buildings to commence at the roof, and that it is necessary, in order to carry away the wreckage, to cut holes and make chutes vertically through the building from the roof downward, etc. But such a chute was not thereafter constructed which passed through Gairing's rooms. And the entire evidence clearly discloses that it was not necessary in the orderly progress of the wrecking work for Rupert and defendant's other workmen to do the particular work over Gairing's rooms at the time and in the manner as shown; but that the same was willfully, wantonly and maliciously done. And we are satisfied that the jury's verdict on this issue, and the judgment which followed, are sufficiently sustained by the evidence and the law. In Burdick's Law of Torts, 1908 Ed., p. 345, it is said: "It is also established that one, who illegally interferes with the possession of a chattel, is liable in trespass to the one whose actual possession is invaded, although such possession is illegal. A successful defense to the action of trespass must rest upon the rightfulness of the

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defendant's conduct, not upon the defects in plaintiff's title, or in his right to possession." In 2 Seely on Torts, 3rd Ed., *p.380, it is said: "There are several reasons why the law ^{cannot} suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title against a mere intruder. First. Whoever assumes to make such an entry makes himself judge in his own cause, and enforces his own judgment. Second. He does this by the employment of force against a peaceable party. Third. As the other party must have an equal right to judge in his own cause, and to employ force in giving effect to his judgment, a breach of the public peace would be invited, and any wrong, if redressed at all, would be redressed at the cost of a public disturbance, and perhaps of serious bodily injury to the parties." In Reeder v. Purdy, 41 Ill. 373, 236, it is said: "Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." In the present case the jury only awarded to plaintiff as damages such as had accrued to her intestate for injuries done to his property by the acts of defendant's servants.

It is also urged that the judgment should be reversed because plaintiff was allowed to introduce certain testimony tending to show that Gairing never in fact was personally served with process in the condemnation suit. If it be conceded that this testimony was improperly admitted, it is not think that the error is such as warrants a reversal of the judgment, inasmuch as it appears that the

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is of great importance in the theory of differential equations. The second part is devoted to the study of the properties of the solutions of the equation. It is shown that the solutions of the equation are unique and that they depend continuously on the initial conditions. The third part is devoted to the study of the asymptotic properties of the solutions. It is shown that the solutions of the equation tend to zero as $t \rightarrow \infty$.

The fourth part is devoted to the study of the stability of the solutions. It is shown that the solutions of the equation are stable in the sense of Liapunov. The fifth part is devoted to the study of the periodic properties of the solutions. It is shown that the solutions of the equation are periodic in t if and only if the right-hand side of the equation is periodic in t . The sixth part is devoted to the study of the resonance properties of the solutions. It is shown that the solutions of the equation are resonant if and only if the right-hand side of the equation is resonant.

The seventh part is devoted to the study of the bifurcation properties of the solutions. It is shown that the solutions of the equation bifurcate from the trivial solution if and only if the right-hand side of the equation bifurcates from the trivial solution. The eighth part is devoted to the study of the global properties of the solutions. It is shown that the solutions of the equation are global if and only if the right-hand side of the equation is global.

The ninth part is devoted to the study of the numerical properties of the solutions. It is shown that the solutions of the equation can be approximated by the solutions of a finite difference equation. The tenth part is devoted to the study of the qualitative properties of the solutions. It is shown that the solutions of the equation are qualitatively different from the solutions of a linear equation.

record of the condemnation judgment obtained by the City was introduced in evidence and the jury were instructed that Gairing was bound by that judgment.

The judgment of the Superior court should be affirmed and it is so ordered.

1911 Dec. 11.

Scanlan, P. J., and Barnes, J., concur.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

34355

MICHAEL LACK,
Appellee,

v.

ANNA LACK,
Appellant.

INTELLIGENCE

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

258146172

MR. JUSTICE GRINERY DELIVERED THE OPINION OF THE COURT.

The defendant, Anna Lack, has perfected the present appeal under the statute from the temporary injunctional order, entered by the circuit court on Saturday, April 5, 1930, without notice, as follows:

"Upon reading complainant's bill of complaint and accompanying affidavit, it is ordered that an injunction issue, without notice, in the above entitled cause as prayed in said bill, that George Shaw and Mary Shaw, his wife, and K. H. Margerson, cease and desist from paying the rents on the premises on the County Line Road, Highland Park, occupied by said parties and owned by Michael Lack or Anna Lack, to said parties, and that they pay same to the Glencoe State Bank, Glencoe, Illinois, for the parties of interest; and, furthermore, that said defendant, Anna Lack be restrained and enjoined from collecting any more rents on said premises or from molesting or interfering with the tenants, George Shaw, Mrs. Mary Shaw or K. H. Margerson, all pending the further order of this court. And for good cause shown, it is further ordered that said injunction issue without bond. Leave is likewise granted to any sheriff or deputy to serve same on Sunday."

Complainant's bill of review, filed by leave of court on April 4, 1930, alleges in substance that under Anna Lack's bill for a decree for divorce she, on July 3, 1929, obtained such a decree against him (Michael Lack) in said circuit court on the ground of extreme and repeated cruelty - the court reserving the questions of property rights, etc., for future determination and decree; that subsequently, on December 17, 1929, the court entered a further decree finding that the parties owned in joint tenancy certain real estate in Highland Park, Illinois, which was improved by a frame residence

1. The first part of the report is devoted to a general survey of the situation in the country. It is followed by a detailed analysis of the economic situation, which is the main subject of the report. The third part of the report is devoted to a study of the social situation, and the fourth part to a study of the political situation. The report concludes with a summary of the findings and a list of recommendations.

2. The second part of the report is devoted to a detailed analysis of the economic situation. It is followed by a study of the social situation, and the third part to a study of the political situation. The report concludes with a summary of the findings and a list of recommendations.

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4. The fourth part of the report is devoted to a study of the political situation. It is followed by a study of the economic situation, and the fifth part to a study of the social situation. The report concludes with a summary of the findings and a list of recommendations.

and a frame cottage in the rear, that the property was encumbered by a first mortgage of \$5,000 and a second mortgage of \$1,000, that the first mortgage was past due and unpaid, that there were also a number of unpaid mechanics' liens on the property which had been purchased by the joint earnings and savings of the parties, and that \$2,500 had recently been expended by Anna Lack in the payment of certain liens and taxes; that the court adjudged that the property rightfully should become vested in Anna Lack, subject to the mortgages, etc., and that Michael Lack should within five days convey to Anna all his right, title and interest in the property; that since the rendition of the decrees complainant "has discovered new matters of consequence and materiality in said divorce cause, particularly that Anna Lack, alias Saloschan, had at all times and still has a husband, Wilhelm Saloschan, living in Vienna, Austria, " " which new matters complainant did not know and could not by reasonable diligence have known so as to make use thereof in said divorce cause previous to and at the time of the hearing and the pronouncing of said decrees;" that complainant first actually learned of these facts on or about February 28, 1937, at which date his solicitor received a letter from the American Consulate General at Vienna through the State Department at Washington, advising him thereof; that complainant is advised that said new matters constitute a complete defense to Anna Lack's said divorce proceeding, that the court was without jurisdiction to enter said decrees in her favor, and that the same could not have been obtained except upon her false and fraudulent testimony and her concealment of the true facts; that the decrees as to the property settlement should be set aside as grossly unfair and fraudulent as to complainant; and that both decrees, because of the discovery of said new matters, ought to be reviewed and reversed.

There are the further allegations that the premises,

awarded to Anna Lack by said decree of December 17, 1929, "are subject to certain mortgages payable to the Glencoe State Bank of Glencoe, Illinois, in the amount of \$5,000, as a first mortgage, and \$1,000 as a second mortgage, and that the interest thereon is past due and unpaid, and that your orator fears that said Glencoe Bank will cause foreclosure proceedings to be started on one or both of said mortgages;" that Anna Lack "is collecting the rents and appropriating the proceeds to her own use and, your orator is informed, is not paying the interest or charges thereon, and your orator fears he will suffer irreparable injury if foreclosure proceedings be instituted;" that said Glencoe Bank has indicated its willingness to grant extensions if the rents in the amounts of \$50 and \$35 are paid to it for the benefit of the parties; that the tenants paying \$50 are George Chas and wife and the tenants paying \$35 are E. H. Margerson and wife; and that your orator "will suffer irreparable injury if notice is given to defendant, Anna Lack, of the application for an injunction."

Then follows a prayer for a temporary injunction, without notice and without bond, substantially as granted by the court as first above mentioned. And at the end of the bill is the following affidavit of complainant, sworn to on April 2, 1930:

"Michael Lack, * *, on oath says that he has heard the bill read and understands the contents thereof; that the matters therein set forth as new matters are true in substance and in fact; that they were first discovered by this affiant since the rendition of the decree in the foregoing bill mentioned, to-wit, about the time therein stated, and that the same could not possibly be made known or used at that time when said decree was heard or the decree rendered."

It further appears that on the application for the injunction without notice, the following separate affidavit (referred to in the injunctive order as the "accompanying affidavit"), sworn to on April 4, 1930, was presented and filed on April 5th:

"Michael Lack on oath deposes and says that * * he is advised and informed and so states the fact to be that the defendant (Anna Lack) keeps herself in hiding and concealment and that service of the summons and

injunction in the above matter will be very difficult and almost impossible, that complainant will be greatly prejudiced if the injunction in this cause be not issued and served immediately as the rent on the various premises are due on the 6th of the month, and said Anna Lack has demanded and is trying to collect the rent of the various tenants for the month of April, and has notified them that she will return to collect same on Sunday, April 8, 1930. Said defendant has already collected the rent for several months last past and has appropriated same to her own use and is allowing the interest on the several mortgages to become in default, that she has no tangible thing except the estate in controversy, and will be unable to make restitution to this complainant if the cause of action is determined against her, to the irreparable injury of this complainant, and that unless same be immediately so issued the benefits will be largely lost.

Therefore, affiant prays that an injunction may issue without notice and without bond on the cause shown, with permission and authority of the sheriff of Lake County to serve same on Sunday upon said Anna Lack or her agents, solicitors and servants, and, if and while he do so, that the sheriff of Cook County may serve same upon her, her solicitors, agents and servants wherever found in said county."

So are all the opinion that the interlocutory injunctive order in question, issued without notice to defendant, was improvidently entered and ought to be reversed. In section 3 of the "Injunctions" Act (Canill's Stat. 1929, Chap. 60, p. 1446) it is provided:

"No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the bill or affidavit accompanying the same, that the rights of the complainant will be greatly prejudiced if the injunction is not issued immediately or without such notice."

It will be noticed that the main fact alleged for the review and reversal of the divorce decree obtained by Anna Lack, as well as the subsequent decree by which she became the sole owner of the property in question subject to certain mortgages, is that she, prior to her marriage to complainant, had, and at all times since has had, a husband named Balaschian living in Vienna, Austria, but that complainant does not positively allege this to be so, - only alleging that about February 26, 1927, his solicitor was so informed in a letter received from the "American Consulate General at Vienna, through the State Department at Washington." In other words such "new matters" are alleged solely upon information thus received. It will further be noticed that in the

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affidavit to the bill, it is stated that such "new matters" (of which complainant has so been informed) "are true in substance and fact," and that no other allegations of the bill are sworn to. And it will further be noticed that the statements contained in the accompanying affidavit are based solely upon advice and information received by affiant and are not verified as being the true facts.

It, therefore, does not sufficiently appear by proper allegations either that complainant is entitled to the ultimate relief prayed for or that his rights, if any he has, will be unduly prejudiced if the temporary injunction is not issued immediately and without notice. He alleges in the bill that he "fears" that the Glencoe Park will start foreclosure proceedings on certain mortgages and that he will suffer irreparable injury if such proceedings are instituted, but he does not state any facts showing wherein these fears are justified. Nor does he state facts sufficiently showing that Anna Lack is not entitled to collect rents on the property in question, of which she appears to be the sole owner by virtue of the decree of December 17, 1928. It is well settled that in granting the issuance of a temporary injunction without notice the necessary allegations must be verified positively, and that their verification upon information and belief will not suffice. (Board of Trade v. Bicknell, 94 Ill. App. 298, 309; Leiter v. Benda, 99 Ill. App. 64, 67; Christian, deceased v. People, 225 Ill. 244, 249.)

For the reasons indicated the temporary injunctive order of April 5, 1930, is reversed.

REVEREND.

Scanlan, F. J., and Barnes, J., concur.

24381

CHICAGO TITLE AND TRUST COMPANY,
a Corporation,

APPELLEE,

vs.

THE GAGE STREET BUILDING CORPORATION,
ET AL.,

APPELLANT.

Appeal from inter-
locutory order of
Superior Court of
Cook County appoint-
ing receiver.

On appeal of RUDOLPH LEONARD,

APPELLANT.

Opinion filed July 2, 1930.

MR. JUSTICE REBEL delivered the opinion of the
court.

This is an interlocutory appeal from an order entered
March 18, 1930, appointing the Chicago National Bank and Trust
Company, receiver of certain real estate in Cook County, Illinois,
which order was based upon a verified petition filed on behalf
of the complainant.

From such order it appears that the maker of the trust
deed under foreclosure did thereby pledge the rents, etc., and
did thereby consent in case of foreclosure that a receiver may
be appointed without regard to solvency or value of the security;
that petitioner should not be required to furnish bond for the
making or granting of such application; that the Chicago National
Bank and Trust Company was appointed receiver for the premises,
with the usual powers; and it was further ordered that the
complainant being duly qualified was excused from filing its

Opinion filed July 2, 1933.

complainant's bond herein as a condition to the qualifying of said receiver; that the Straus National Bank & Trust Company has qualified as trustee under the laws of the State of Illinois, and was excused from furnishing a receiver's bond.

On March 25, 1930, Rudolph Lederer filed his appearance and answer, and on the following day his cross-bill and affidavit, and upon notice to all the parties, presented his motion to vacate the appointment of the receiver and to discharge the receiver appointed under the order of March 15, 1930, and for the appointment of a receiver under his cross-bill. An order was entered extending the receivership for the benefit of Lederer, and he filed a complainant's bond as required by statute, which was approved. The order was entered without prejudice to cross complainant's motion to vacate the order appointing the receiver of March 15, 1930. At the same time, the court entered the following order:

"On motion of solicitors for complainant the order entered herein on March 15, 1930, appointing a receiver herein is amended by requiring that complainant file herein instantler a complainant's bond in usual form in the sum of \$500. To the entry of which order the cross complainant Rudolph Lederer objects."

and thereafter, on March 31, 1930, the appellant, Rudolph Lederer perfected this appeal from the interlocutory order appointing the Straus National Bank and Trust Company receiver, by filing his appeal bond.

One of the errors assigned by appellant is that the order of March 15, 1930 does not require the complainant, Chicago Title & Trust Company to file a bond required by the statute. (Sahill's Rev. Stats. of Ill., Chap. 22, Sec. 55.)

At the time the court entered the order of

March 26, 1930, amending the order of March 15, 1930, requiring the complainant to file a bond of \$200, which was filed and approved, the court had jurisdiction of the parties and the subject matter. It needs no citation of authorities to sustain the rule that a court of competent jurisdiction is empowered by the statute to modify, amend or set aside an order appointing a receiver. So in this case if the Court reach the conclusion, which it did, of the necessity that the complainant file a bond required by law, the court acted and exercised the power that always rests with the Chancellor to control the parties and the proceedings in a case pending before him.

It is urged that the order of March 15, 1930, is void and that the amending order of March 26, 1930 is of no effect and does not remedy the error.

This court is of the opinion that the order of March 15, 1930, appointing the receiver is not a void order, but erroneous, and is subject to amendment, which was done by the order of March 26, 1930. This question was considered by the Appellate Court in the case of Valenti v. Kralik, 334 Ill. App. 407, where, at page 410, the opinion states, in part:

"It has frequently been held by this Appellate Court that to entitle a complainant to the appointment of a receiver, pendente lite, he must give the bond required by the statute, unless the court shall be of the opinion that a receiver ought to be appointed without the giving of such bond, and, if so, that such opinion must affirmatively appear in the order of appointment (Batson v. Gudney, 144 Ill. App. 534, 538; Stear v. Rock, 145 Ill. App. 341, 347); and that an appointment of a receiver, without complaint giving a bond or without such opinion of the court being so affirmatively expressed, was erroneous. (Baras v. Graham Partnership

Coal & Lumber Co., 150 Ill. App. 137, 143;
Fluks v. Phelps, 177 Ill. App. 85, 97.) But it
does not follow, as here contended by counsel for
Farrell and as found by the court in the order now in
question, that the appointment of the receiver was void.
(Bothman v. Lindstrom, 251 Ill. App. 262, 272.)"

The question is raised on this appeal that no
allegation in the bill or finding of the court that the
premises constitutes scant security, that waste was committed
or that the maker of the notes is insolvent, and that without
such averments the appointment of a receiver would not be
justified.

The defendant, The Cass Street Building Corporation,
the owner of the equity of redemption, was served with notice
that application by the complainant would be made to the court
for the appointment of a receiver, and is not objecting to the
order entered by the court appointing a receiver.

It appears from the allegations of the verified bill
of complaint that in the case of the filing of a bill in chancery
to foreclose such a trust deed, a receiver may be appointed by
the court at the time of the filing of such bill, or at any
time thereafter, with the usual powers of receivers in chancery
to take immediate possession of and to operate and lease said
premises and property, to collect the rents and income therefrom,
during the pendency of said suit and during the period as pro-
vided by the statutes of Illinois for satisfaction or redemption
from any sale or decree entered therein may be made; and that
the right to an appointment of a receiver is without regard to
the solvency or insolvency of the person at the time of said
application liable for the debt secured thereby and without regard
to the then value of the mortgaged property and without regard to
whether or not said mortgaged property shall be

occupied as a homestead, which was also set out in the verified petition presented to the court for the appointment of a receiver.

The bill of complaint sets forth that a default has occurred in the payment of accrued interest in the sum of \$16,439.75; that the trust deed assigned and pledged the rents and profits as security for the payment of the indebtedness and interest thereon, and, as has been already stated, the bill shows default in the payment of accrued interest, which was a breach of the covenants of the trust deed. It is admitted by appellant that said trust deed securing the indebtedness is a first lien.

The necessity for the appointment of a receiver is apparent from the allegations of the bill of complaint, and the order, as amended, appointing a receiver is affirmed.

ORDER AFFIRMED.

HOLDOM, P. J. AND WILSON, J. CONCUR.

34044

RUDOLPH FISCHMAN, LOUIS FISCHMAN
and HARRY FISCHMAN,
Defendants in Error,

vs.

CHARLES E. SCHARF,
Plaintiff in Error.

WRIT TO MUNICIPAL COURT
OF CHICAGO.

2581A 6174

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant in the trial court,

Charles E. Scharf, seeks to reverse an order entered by that court denying his motion to set aside a judgment by confession entered against him on July 29, 1929, for the sum of \$180 due under the terms of a written lease.

The lease between the parties provided by its terms, in substance, that it was contemplated by the lessors that the leased premises would be remodelled and recited that the lessee had been shown a sketch disclosing the exact dimensions of his office when remodelled; that the same was satisfactory to the lessee, and that the lessee agreed to permit the lessors, by their agents, to enter upon the premises for the purpose of making the necessary changes in remodeling and waived any and all claims for damages "of whatever kind or nature because of such remodelling."

The affidavit avers that defendant told plaintiffs he did not wish to consent to this provision; that the period was his busiest months and that he could not afford to be interrupted in his work; that it was essential to have the continued use of gas and electricity; that the weather was too cold to do without steam heat; that plaintiffs repeatedly assured defendant that his work could go on unmolested; that a temporary partition would be erected in order to secure privacy and freedom from the plaster, debris and dust incidental to making the alterations; that one of the plaintiffs assured defendant that certain other offices would be available and could be used for two or three days, and that these alterations which would affect his rooms

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1997

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would not occupy more than two or three days at most.

The affidavit avers that defendant signed the lease upon these representations; that the adjoining offices, however, were never given to defendant; that defendant was forced out of his office for more than two months, "his furniture practically ruined," instruments lost and some of them stolen; that on April 8, 1939, a group of workmen entered the premises, tore down the walls and partitions, poured plaster, debris, dust and wrecking material indiscriminately throughout the different rooms, and rendered it impossible for him to do any work, to consult with, examine or prescribe for his patients; that the gas, electricity, water, heat and telephone were cut off; that during the period from April 8th until June 17, 1939, it was impossible to use the office for the purposes for which it was leased; that the furniture was destroyed and other damages were sustained. Defendant claims damages by way of offset for refinishing the furniture in the sum of \$25, for lettering \$55, for utility man \$15, and for loss of patients and medical practice \$3,000, making a total sum of \$3,095.

Defendant maintains the right to set off these claims for damages against the amount of rent due, under section 47 of the Practice act, as amended. See Laws of Illinois, 56th General Assembly, 1929, p. 580.

In the recent case of Fritz Kral v. Harry Vassile, Gen. No. 34136, not yet reported (opinion filed June 30, 1939), we held that this section 47 of the Practice act was not applicable to claims for unliquidated damages made by a lessee by way of set-off to an action for rent. We adhere to that opinion. Moreover, it seems to be well settled in this state that a judgment by confession will not be opened up for the purpose of permitting a plea of set-off to be filed or for the purpose of permitting a cross action. Boss v. Hallgren, 4 Ill. App. 417; Reehler v. Glauw, 169 Ill. App. 537; State Bank of Mansfield v. Stauffer, 301 Ill. App. 132.

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The court did not err in denying defendant's motion to set aside the judgment, and the order is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

34046

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BERNARD FISCHMAN, LOUIS
FISCHMAN and HARRY FISCHMAN,
Defendants in Error.

v.

FRANK C. BOB,
Plaintiff in Error.

APPEAL TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the
sum of \$180 entered by confession against defendant under the
terms and provisions of a written lease.

The facts in the case are similar to those which appear
in Gen. No. 34044, Rudolph Fischman et al. v. Charles E. Chart,
in which an opinion is this day filed.

For the reasons stated in that opinion the order of the
trial court in this case is also affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

Journal of Management Inquiry 18(6)

34264

WILLIAM O. GOODRICH COMPANY,
a Corporation,

Appellant,

vs.

PETERSON CORE OIL MANUFACTURING
COMPANY, a Corporation,

Appellee.

APPEAL FROM SUPREME COURT
OF ILLINOIS.

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MR. JUSTICE MCGUIRE DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming \$11,855.08 due from defendant by reason of the alleged breach by defendant of contracts to purchase linseed oil, upon trial by a jury had a verdict of \$300. It appears from the judgment on the verdict. Defendant does not assign any cross-errors.

There is virtually little dispute as to the facts. The question presented is whether the contracts for the sale and delivery of oil were cancelled by the plaintiff, in which case there could be no breach by defendant.

Three contracts were made for the delivery of linseed oil to defendant. The first, dated March 16, 1925, was for 8,000 gallons at \$1.03 per gallon; the second contract, dated March 19, 1925, was for 8,000 gallons at \$6.99 per gallon; and the third contract, dated April 10, 1925, was for 16,000 gallons at \$1 a gallon. Defendant was to furnish specifications for shipments in any subsequent month; in the absence of shipping specifications defendant was to pay storage charges of $\frac{1}{2}$ ¢ per gallon per month "as long as the Seller shall be willing to carry same." The terms were cash in ten days from date of each shipment less discount of thirty day trade acceptances. The buyer's failure to accept any shipment or to pay when due gave plaintiff the option to refuse to make further deliveries. Shortly after these contracts were entered into there was a marked decline in the market prices of oil so that defendant did not give delivery specifications for some time thereafter. In

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January, February and April, 1926, there were deliveries of 5 tank wagons of oil. These were paid for in cash and in notes which were accepted by plaintiff.

Owing to the fall in the market price of oil the parties met in conference April 12, 1926, to talk the matter over. At this conference were Mr. Eastman, president of the plaintiff company, Mr. Procter, plaintiff's Chicago agent, Mr. Peterson, president of defendant company, and Mr. Marquardt, defendant's office manager. All of these men gave testimony at the trial. It was there agreed to settle all storage charges against defendant by its paying \$50, which was in full payment up to May 1, 1926. This was later confirmed by letter of plaintiff. Eastman testified that Peterson promised to keep the contracts in force and that defendant would pay the storage accruing under them; that it was the intention of plaintiff to carry out the contracts; but that defendant refused to give a financial statement. Procter testified that the understanding was that the oil was to be delivered only on a C. O. D. basis and that Eastman made the statement that he could not make any more deliveries except on a C. O. D. basis and that Peterson replied that he would not take the oil on this basis; that Peterson understood and knew that he could not get any more oil except on a C. O. D. basis. Marquardt, testifying for defendant, said that Eastman stated they would not deliver unless the oil was delivered C. O. D.; that Peterson said he would not take it except under the terms of the contract. Peterson also testified that Eastman wanted a financial statement but was told by Peterson that he would not give it and that defendant was ready to live up to and fulfill the contracts. Eastman, on cross-examination, was asked these questions with reference to the conference:

"Then you decided you would not sell them any more goods unless they paid the cash?

A. Yes, sir, absolutely, we have that right under the contract, it is stated in the clause of the contract.

Q. Then you were not ready, willing and able to deliver any more oil under these contracts unless he paid the cash?

A. Unless he paid the cash and continued to pay storage as is specifically stated in our contracts, and he did neither."

April 16, 1926, plaintiff wrote defendant saying, in substance, that they had requested from defendant a financial statement which apparently defendant was reluctant to furnish and requesting that defendant send a financial statement to their home office in Milwaukee and stating: "We are, therefore, reluctant to extend you further credit at this time until we have your latest financial statement." No further letters were written after this time and a financial statement was not sent. Eastman testified that thereafter he offered to deliver oil to defendant for cash; that the reason why he had decided not to extend any more credit to defendant was that plaintiff's credit department had stated that defendant's line of credit was far in excess of what it was entitled to and because of defendant's unwillingness to furnish a financial statement and that he decided not to sell it any more goods unless it paid cash.

It was also in evidence that defendant after the letter of April 16, 1926, asked plaintiff for the delivery of a tank of oil but was told it would be delivered only on a C. O. D. basis, and thereupon defendant declined to take it on this basis. Marquardt also testified that he told Procter, plaintiff's Chicago manager, that he needed another tank of linseed oil for immediate shipment, to which Procter replied that he could not ship except on a C. O. D. basis. There was also other correspondence tending to show that plaintiff had on April 16, 1926, exercised its right to cancel the contracts and would agree to deliver oil to defendant only upon a cash basis and not under the terms stated in the contracts. Subsequently defendant wrote that it understood by plaintiff's letter of April 16, 1926, that the contracts had been cancelled and denied that it owed any money to plaintiff.

1. That you were at home, at night, and that you were at home at night.

2. That you were at home, at night, and that you were at home at night.

3. That you were at home, at night, and that you were at home at night.

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21. That you were at home, at night, and that you were at home at night.

22. That you were at home, at night, and that you were at home at night.

From these and other facts the jury could properly find that plaintiff cancelled its contracts on April 16, 1936, and therefore there was no breach by the defendant.

It is argued that the court erroneously instructed the jury that if it believed that the letters under date of April 16, 1936, and October 13, 1937, were written by plaintiff to defendant and received by defendant, such letters amounted to a renunciation or cancellation of the contracts by plaintiff. Under the evidence submitted these instructions were proper. They may be open to criticism in resting defendant's case solely upon these letters, but in view of the admitted circumstances and especially the repeated refusal of plaintiff to continue deliveries of oil except on a cash basis, we are of the opinion that the errors, if any, in giving the instruction in the form in which it was given should not work a reversal. The defense was a question of fact and the letters in connection with the conversations of the parties show almost conclusively that plaintiff had refused to carry out the terms of the contracts.

Criticism is also made of the court's failure to instruct specifically as to the measure of damages. The instructions were oral and counsel for plaintiff simply requested the court to "instruct the jury specifically as to the measure of damages." In Northwestern Elevator & Grain Co. v. Smiley, 184 Ill. App. 351, it was said that, where parties consent to the giving of oral instructions, neither party can assign as error the failure of the court to give some instruction which was not asked for. "To so hold would make oral instructions a trap for the court."

The instructions were correct as far as they went and we hold that although they were not complete, a reversal because the trial Judge did not instruct on every possible phase of the case is not justified.

We appreciate the point that to be consistent the jury should have allowed plaintiff nothing instead of \$500. But, as

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defendant does not complain of this by error-~~error~~ and as substantial justice seems to have been done, we are disposed to permit the judgment to stand. It is therefore affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

34241

JAMES J. BROWN PLASTERING
COMPANY,

Appellee.

vs.

NATHAN GROSSMAN,

Appellant.

APPEAL FROM SUPREMACY COURT
OF COOK COUNTY.

258 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover \$4001.92, claimed to be balance due under a written contract entered into between plaintiff and defendant for the lathing and plastering of a ten-story building located at 226 South Wabash avenue, Chicago. The common counts, including an account stated, were filed. The defendant filed a plea of general issue and notice of a special defense. Afterwards, on the trial before the court without a jury, the defendant was given leave to file amended pleas and notice of special defenses, which he accordingly did. The court heard the evidence, found the issues for the plaintiff and judgment was entered in favor of plaintiff against defendant for \$4001.92, and defendant appeals.

The record discloses that under a written agreement entered into between plaintiff and defendant, plaintiff did the lathing and plastering in the building known as 226 South Wabash avenue, Chicago, and after the work was done there was an accounting between the parties showing a balance due of some \$8,000, \$4,000 of which was paid by checks and defendant gave plaintiff what is designated as a trade acceptance for the balance, viz \$4001.92. It is conceded by both parties, as it was in the trial court, that the trade acceptance was incomplete, not properly executed and therefore not binding. Counsel for plaintiff say in their brief that they took this view of the trade acceptance and therefore brought suit, filing the common counts, as above stated.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

Notes: 1. The above data are based on the information provided by the respondents.

...and the ...

The evidence further shows that after the contract for the laining and plastering was entered into and the building constructed, it was transferred to a corporation known as the 226 South Wabash Building Corporation. On the trial the defense interposed was that when the amount had been agreed upon between the parties, plaintiff was paid in the form of two checks about \$4,000 and the trade acceptance for the balance of \$4,001.92 was executed and delivered to the plaintiff; that at that time it was understood that the trade acceptance was to be submitted to the bank to see if it was in proper form; that afterwards plaintiff's representative advised defendant that the trade acceptance was not in satisfactory form and demanded judgment notes; that the Building corporation executed its two judgment notes and delivered them to plaintiff in lieu of the trade acceptance and in payment of the balance due, and that it was agreed between all the parties that the notes were accepted in full payment of Grossman's obligation under the contract.

Three witnesses testified for the defendant that the two judgment notes made by the Building corporation were delivered to plaintiff's representative. Plaintiff's representative denied that he ever received such notes. Whether the two notes were so given is the only question in the case. The court heard and saw the witnesses and read the affidavits attached to the defendant's pleas, and upon consideration found in favor of the plaintiff's version and against the defendant. Upon a careful consideration of the entire record we think we would not be warranted in disturbing the finding of the trial Judge on the ground that it was against the manifest weight of the evidence.

The contention made by plaintiff^{is} that since the bill of exception fails to show a motion for a new trial or in arrest of judgment or exception taken to the judgment, there was no question saved for review except whether the judgment is supported by the evidence.

The trial having been before the court without a jury,

The following are the names of the persons who have been

appointed to the various positions in the

Department of the Interior, and the names of the persons who

have been appointed to the various positions in the

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a motion for a new trial is unnecessary, nor would the motion in arrest of judgment serve any purpose because no question is made by the defendant that the judgment should have been arrested; and since the amendment of Sec. 81 of the Practice act, it is unnecessary to except to the entry of the judgment. Miller v. Anderson, 369 Ill. 608.

As stated, the case as presented in the trial court and in this court involved but one question of fact - whether the defendant had made and delivered two promissory notes for the \$4861.98 which was admittedly due. The court having found in favor of the plaintiff we feel that we would not, under the law, be warranted in disturbing the finding and judgment.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

34141

JOHN J. HOLLAN,
Appellant,

v.

JOSEPH E. LINQUIST,
COMMONWEALTH EDISON
COMPANY, a corporation,
et al.,
Appellees.

25811.018⁴

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior court, entered December 13, 1929, dismissing for want of equity complainant's second amended bill, which is in the nature of a bill to review the proceedings and judgment in a certain mandamus cause, entitled "People, ex rel. Lindquist v. Commonwealth Edison Company et al." The decree was entered after the general and special demurrer of Joseph E. Lindquist to the bill had been sustained, and complainant had elected to stand by the bill. The litigation concerns the ownership of 250 shares of the stock of the Commonwealth Edison Company.

On August 16, 1927, in the mandamus cause, the Superior court entered a final order commanding that the Commonwealth Edison Company permit Lindquist to transfer six certificates (aggregating 250 shares) to his name and issue to him new certificates, and commanding that certain officers of the company sign the new certificates when issued and that a certain named bank register and countersign them when presented for registration. To reverse the order John J. Hollan sued out a writ of error from the Supreme Court, but it was transferred to this appellate court, and on January

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7, 1929, this court in effect affirmed the order (for reasons stated in its opinion) although it remanded the cause "with directions to enter a similar judgment, though in different form, against defendants." (People, ex rel. Lindquist v. Commonwealth Edison Co., 251 Ill. App. 76, 88.) Nolan's application to the Supreme Court for a writ of certiorari was denied. (251 Ill. App. p. xxxix.) Subsequently, on April 27, 1929, the Superior court complied with the mandate of the appellate court, and on the same day Nolan filed his original bill in the present cause. Lindquist's demurrer thereto was sustained, as was a similar demurrer to Nolan's first amended bill. On November 2, 1929, Nolan filed his second amended bill (now in question), the gist of which is that said mandamus order was obtained by fraud and perjury and in pursuance of a conspiracy to defraud Nolan of the 250 shares of stock. The prayer of the bill is that "said mandamus cause may be reheard; that the judgment order therein made be set aside and reversed, and that restitution of the stock certificates (or the proceeds of the sale thereof if they have been sold) be made to your orator; and that he be granted such further and general relief as the nature of his cause requires and to equity appertains."

It appears from this court's opinion (251 Ill. App. 76, 79) that Lindquist alleged in his petition for mandamus that on July 30, 1927, he had purchased for a valuable consideration from Mrs. Josephine Nolan the 250 shares of stock; that the six certificates therefor had originally been issued to John J. Nolan (complainant herein); that thereafter Nolan had sold the stock, and by endorsements on the certificates had assigned them to Mrs. Nolan; that thereafter Mrs. Nolan had assigned them to Lindquist and had appointed him as her attorney to transfer the stock to him on the books of the Commonwealth Edison Co.; that on August 11, 1927, Lindquist had presented the

certificates to the proper officers of that company, had demanded that the stock be transferred on its books and new certificates issued to him; and that said officers had refused his demands. It further appears from the opinion (p. 80) that on August 17, 1927, the Commonwealth Edison Co. and its said officers had each filed separate pleas, alleging in substance that prior thereto Nolan had served upon them a "stop transfer order," directing them not to transfer any of the certificates until further directions from him, and further alleging that Nolan, under date of August 5, 1927, had also filed with them his affidavit, stating that he was the owner of the stock and the certificates, that the name "John J. Nolan," purporting to be his signature on the reverse side of each certificate, was "not his signature," and in each case was a "forgery," that he had never authorized any person to affix his signature to the certificates, and that he had never delivered any of them to any one with the intention of transferring his title thereto. It further appears from the opinion that the mandamus cause was commenced on August 11, 1927; that originally Nolan was not made a party thereto; that on August 13, 1927, on Lindquist's motion and by virtue of section 7 of the Mandamus Act, the superior court made Nolan an additional party defendant and caused a summons to be issued, commanding him to appear on August 15, 1927; that Nolan was served on August 17th; that he did not enter any appearance on the return day, and on August 19th Lindquist asked that his default be taken; that on the same day (August 19th) Nolan, by his attorney, entered a "limited appearance for the sole purpose of moving to quash the summons and process therein and contesting the jurisdiction of the court" over his person; that there was a full hearing in open court on August 19, 1927, at which, in support of Lindquist's petition, evidence was introduced "tending to establish the authenticity of Nolan's signature to the assignments to Mrs. Nolan"; that Nolan's attorney was present at the hearing and made no attempt to introduce

any evidence to the contrary; and that no bill of exceptions, signed by the judge, was preserved as to the proceedings at the hearing. and we said in the opinion (p. 82): "It thus sufficiently appears that Nolan preferred not to enter a general appearance and contest the transfer of the stock, as prayed for, on the ground of the claimed forgery of his signature to the assignments to Mrs. Josephine Nolan, and determined then to rest his whole case on the claimed want of jurisdiction of the court over his person."

In the bill in question in the present cause, after setting forth at length the petition and other pleadings in the mandamus cause, Nolan alleges that Lindquist, Mrs. Nolan, two witnesses (who testified on the hearing of said cause as to the genuineness of Nolan's signatures on the certificates), and Jacob J. Horn (the attorney for Lindquist and Mrs. Nolan) prior to the filing of said mandamus petition, "conspired to fraudulently obtain title to the stock certificates and to deprive your orator (Nolan) of the ownership thereof, and, in pursuance of said conspiracy, Mrs. Nolan falsely sworn to and filed a complaint in the Municipal court of Chicago, charging your orator with the crime of perjury;" that by virtue of this complaint Nolan was arrested under a warrant on August 17, 1927; that while in custody of the police on that day he was served with process in the mandamus cause; that he remained in such custody for about three hours when he gave bail and was released; that the criminal cause was set for hearing on the morning of August 18th; that he then appeared in the Municipal court, but, no one appearing to prosecute him, said criminal proceedings were dismissed for want of prosecution and he was discharged; and that "said criminal proceedings were instituted by Mrs. Nolan in pursuance of a plan by the aforesaid conspirators to so embarrass your orator that he could have no time in which to prepare an answer and defense to said petition for mandamus." The above allegation, that the persons

named "conspired to fraudulently obtain title" to the certificates, etc., is a mere conclusion. No facts whatever are stated tending to substantiate any such fraudulent conspiracy. And, as to the allegation of claimed embarrassment to Nolan because of not having time to prepare an answer and defense to the mandamus petition, the same is contradicted by the record of the mandamus cause, wherein it is disclosed that Nolan elected not to make a defense therein upon the merits, and decided to rely wholly upon the claimed lack of jurisdiction of the court over his person.

Nolan further alleges in the bill that, at the time the mandamus cause was commenced (August 11, 1917), "there was also pending in said Superior court" Mrs. Nolan's bill for a divorce against him; that in that cause, just prior to August 17th, Mrs. Nolan had moved for the issuance of a writ of ne exeat Republica against him, and also for an order for temporary alimony, etc., of which motions he received notice while in the custody of the police on August 17th; that on August 18th Mrs. Nolan "falsely testified" as to the amount of Nolan's weekly income, etc.; that the Superior court, because of her false testimony, issued said writ of ne exeat against Nolan and fixed his bond to secure his continued appearance at the sum of \$200,000; that he was unable to give a bond in such a large amount and this fact was known to Mrs. Nolan and her attorney, Kern; that, fearing that he would be arrested in said ne exeat proceeding, he "secreted himself" and did not personally appear in the Superior court on August 18th, as he was directed to do by said summons in the mandamus cause; that, however, on the morning of August 19th, with his knowledge and consent, his attorney entered his said limited appearance in the mandamus cause for the purpose of quashing said summons and questioning the jurisdiction of the court over his person; that the mandamus cause was actually heard on August 19th, of which hearing both he and his attorney had notice; that his

attorney was present at said hearing and represented him; that, after the court had decided that it had jurisdiction over his person by virtue of said summons served upon him in the mandamus cause, his said attorney "moved the court for leave to file his (Nolan's) general appearance and also to file a plea or answer to said mandamus petition," but that said motions were denied; and that, thereby, the court "did not permit your orator to interpose any defense whatsoever." The above allegation that Nolan, by his attorney, at any time during the hearing of said mandamus cause, asked leave to file a general appearance therein, and also a plea or answer to the petition, is contradicted by the record of said writ of error cause as reviewed by this court (251 Ill. App. 76, 81-2.) And the alleged fact, if it be a fact, that Nolan did not personally appear on the hearing of the mandamus cause because of fear of being arrested on account of his claimed inability to give the ne exeat bond, is not here material, for the reason that in the mandamus cause, as above stated, Nolan had decided to wholly rest his defense upon "the claim of jurisdiction of the court over his person."

Nolan further alleges in the bill that the proceedings in the mandamus cause were had during the summer vacation of the Superior court, when by the rules of that court only emergency matters could be disposed of, that there was no emergency, and that the mandamus summons should have been made returnable to the September term of the court, etc. This point was decided adversely to him by the decision in the mandamus cause and should not in the present action be reviewed.

Nolan further alleges in the bill that, after the decision of the Superior court in the mandamus cause, he was allowed ninety days within which to file a bill of exceptions as to the proceedings had on the hearing; that within apt time he, by his attorney, presented a certain bill of exceptions to the judge, who "wrongfully refused" to

sign the same; and that thereby it became "impossible" for him "to secure, on appeal or writ of error, a review of the questions to which the matters appearing in said bill of exceptions gave rise." It will be presumed that the judge had good and sufficient reasons for his refusal to sign the particular bill of exceptions presented. If said bill correctly set forth the proceedings, and the judge acted arbitrarily and without cause in refusing to sign the same, Nolan should then have taken proper steps, by mandamus, to compel said judge to sign the same. The bill, however, does not allege that any such steps were taken.

Nolan further alleges in the bill that, when Lindquist made the purchase of the 250 shares of stock from Mrs. Nolan, it was agreed between Lindquist and said attorney Kern (acting for Mrs. Nolan) that "Lindquist would not be obliged to pay for said shares - * unless and until a valid transfer of the same was made to him on the books of the Commonwealth Edison Co., and unless said Lindquist thereby became the sole and absolute owner of the same;" that, therefore, when Lindquist in his petition for mandamus alleged that he "had purchased said stock from Mrs. Nolan for a valuable consideration," etc., he made a "false and fraudulent allegation;" and that Nolan did not learn of such agreement having been made "until in September, 1928," when said writ of error cause was pending in the appellate court. Assuming these allegations to be true, they afford no basis for the granting of the relief as prayed for by Nolan in the present bill, especially in view of Nolan's election not to make any defense upon the merits in the mandamus cause. Furthermore, it certainly was good judgment on Lindquist's part, before actually paying for the stock, to make sure that Mrs. Nolan's title thereto was good.

Nolan finally alleges in the bill that the six certificates for the stock were kept in the Nolan home in a safe, to which both he and Mrs. Nolan had access; that about July 1, 1927, Mrs. Nolan

"extracted" the certificates from the safe, without Nolan's knowledge or consent and without any endorsement by him thereon; that about July 10, 1927, Mrs. Nolan "forged and counterfeited" Nolan's signatures, transferring said certificates to her; and that subsequently upon the trial of the mandamus cause and "in the furtherance of said conspiracy," Lindquist, Mrs. Nolan and Kern "caused the witnesses, Raymond E. Hildreth, Michael J. Sherman and Mrs. Nolan to falsely testify that they saw your orator sign and endorse said certificates, when in truth and in fact your orator never did so, and never authorized any person to endorse them for him."

After reviewing the present bill, we are of the opinion that the Superior court was amply justified by the law concerning bills of review, in dismissing the bill for want of equity. It appears that, prior to the commencement of the mandamus cause, Nolan, by a "stop transfer order," had directed the officers of the Common-wealth Edison Co. not to transfer on its books the said stock at Mrs. Nolan's direction to anyone, and for the reasons (as disclosed in his affidavit filed with said company on August 3, 1927) that he then claimed that his endorsements on the certificates were forgeries; and that, after the commencement of the mandamus cause and after he had been made a party thereto and had been served with summons, he, on August 19, 1927, upon his attorney's advice, elected not to make any defense upon the merits at the hearing of the cause (although he then had knowledge of the claimed forgeries, and although he then was given full opportunity to present such defense), and decided to rest his defense solely upon the claimed want of jurisdiction of the court over his person. This issue of jurisdiction was decided adversely to him by the Superior court, and subsequently (on writ of error) by this appellate court and (on certiorari) by the Supreme Court. He now seeks by the present bill to raise and have tried the issue as to the claimed forgeries,

which could have been raised and tried originally in the Superior Court in the mandamus cause. The law does not allow him to do this. (Plank v. Plank, 303 Ill. 254, 259; Harrigan v. County of Peoria, 262 id. 36, 42-45; Lewis v. Toppico, 261 id. 320, 329; Giles v. Miller, 273 id. 619, 522; People v. Superior Court, 234 id. 186, 195.)

The decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

23 I.A. 618⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 23 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

JOHN J. DRURY,	:	
Appellee	:	
	:	
vs.	:	Appeal from
	:	the Circuit Court
HENRY C. DIEHL,	:	of Kankakee County.
et al,	:	
Appellants,	:	
JONES:J	:	

Appellee, John J. Drury, filed a bill to the January, 1929, term of court against Henry C. Diehl, The First National Bank of Manhattan, Illinois, et al, to review, reverse, and set aside a decree entered at the January, 1928, term of said court. The bill is termed "A bill in the nature of a bill of review". The First National Bank of Manhattan demurred to it and the demurrer was overruled. The bank elected not to plead further and judgment pro confesso was entered against it.

The decree which is sought to be reviewed was entered in a suit brought by Henry C. Diehl to foreclose two trust deeds on certain lands in Kankakee County. One was given to secure the payment of a note for \$4,000.00 and the other to secure the payment of a note for \$1500.00. Both trust deeds were made to John A. Diehl by William M. Martin but were held and owned by Henry C. Diehl, complainant in the original proceeding. The bill in that suit alleged "that since the making of said two notes and trust deeds, abovementioned, the said William Martin made another trust deed, dated May 12, 1926, to James T. Burns as trustee, securing a note of \$5,792, which is held by the First National Bank of Manhattan, Illinois; and also that since the making of the two notes and trust deeds first above mentioned, judgments have been rendered against the said William Martin in favor of the First National Bank of Braidwood, Illinois, John J. Drury, Louis Frazer, Manteno State & Savings Bank, and Citizens State Bank of Peotone; but that the said trust deed of James T. Burns and all of said judgments are subsequent in date and subject to the first lien of your orator for the two notes and trust deeds,

above mentioned."

Drury and The First National Bank of Manhattan were duly summoned, and the bank filed an answer, admitting the execution of the two trust deeds held by Diehl, but demanded strict proof of the amount due thereunder. The answer further alleged that said bank is advised that Drury and the other defendants named have or claim some interest in and to said premises as judgment creditors or otherwise, but that all of such interests or claims, if any there be, are subsequent and subject to the rights of the bank in and to said premises under its deed of trust. The answer set up the note for \$5,792 executed by Martin to the bank, and also the deed of trust given to Burns to secure it. It further alleged that default was made in the payment of interest; that the bank had elected, under the terms of the deed of trust, to declare the debt due, and it prayed for an accounting and a decree that Martin pay the bank the amount due, and that said indebtedness be declared to be a lien on the premises, subject only to the liens of the trust deeds held by Diehl.

Drury suffered a default and a decree pro confesso to be entered against him. In the decree the court found that it had jurisdiction of the parties to the suit and of the subject matter; that the trust deeds to Diehl are first liens; and that the lien of the trust deed to Burns is prior to the liens of all judgment creditors, and is subject only to the lien of the other two trust deeds.

The ground relied upon by Drury for the review and setting aside of the foreclosure decree is that he obtained a judgment against Martin on May 11, 1926, upon which execution was issued the same day; that the trust deed to Burns was not made or recorded until the next day, May 12, 1926; that the answer of the First National Bank of Manhattan alleging that the lien of Drury's judgment is subsequent and subject to the lien of its trust deed was a fraud on the court and upon the rights of Drury.

If the rights of junior encumbrancers are to be affect-

"Bozaitner evde"

ed by the foreclosure of a senior mortgage, they are necessary parties to the proceeding. (Wehrheim v. Smith, 226 Ill. 346.) But it is not necessary that the bill for foreclosure should set out the priorities between such defendants. That is a matter with which the complainant holding a senior mortgage is not concerned. When a defendant, duly summoned, in such a proceeding claims a priority over the rights of other defendants, it devolves upon him to set up his rights by appropriate action and establish them by proof. (Kehm v. Mott, 187 Ill. 519.)

A bill of review on the ground of fraud must show that the complainant was prevented from interposing in the antecedent suit a defense by fraud and without negligence or fault on his part, and the burden is upon the complainant to establish the fraud by clear and satisfactory evidence. (Regner v. Hoover, 318 Ill. 169; Kretschmar v. Ruprecht, 230 Ill. 492; Crane Co. v. Parker, 304 id. 331.)

It was within the power of Drury to present his case in the original suit, and to have his alleged rights adjudicated. But he failed to do it and no explanation is made for such failure. The only claim of fraud alleged is that the First National Bank of Manhattan, a defendant, set up in its answer that the lien of its trust deed was prior to that of his judgment. He was properly in court, a party to the record, and bound to take notice of the pleadings. He was not lulled into any false sense of security by the answer, but on the contrary, it challenged the priority now claimed by him, and if he desired to refute the bank's claim, it was encumbant upon him to act. We fail to perceive any fraudulent conduct practiced by the bank. Drury's failure to protect his rights was his own action and he must suffer the consequences. (Fellers v. Rainey, 82 Ill. 114.) Where a party slumbers upon his rights while he has an opportunity to assert them in a court of justice, he cannot seek redress in another forum. (Kretschmer v. Ruprecht, supra.)

Appellee insists that the record in the foreclosure proceeding contains no evidence to justify the finding

ed by the foreman of a jury, and the necessary
parties to the proceedings. (Kohn v. ...)
But it is not necessary that the trial should be
out the parties before the jury.
with which the court is
concerned. When a defendant, who is not a party
claims a right over the rights of other persons, it is
upon him to show the rights of the other parties, and to
them by proof. (Kohn v. ...)
A bill of review on the ground of fraud may be
that the complaint was presented for information in the court
without such a defense by fraud and without negligence on the part
on his part, and the burden is on the complainant
the fraud by clear and satisfactory evidence. (Kohn v. ...)
SIS III. 183; Kohn v. ...
v. ...
it was within the power of the court to present the case
in the original suit, and to have the rights
But he failed to do so, and no exception is made for that failure.
The only claim of fraud alleged is that the ...
of ... a defendant, who is not a party to the trial, but the fact of
the fraud need have nothing to do with the ...
in court, a party to the record, and hence to take notice of the
allegations. He has not failed to show the facts of the
by the answer, but on the contrary, he has alleged the facts
now claimed by him, and he has failed to show the facts of the
It is enough to show him to be ...
lent conduct exercised by the party. ...
his rights was his own action and he has not suffered the consequences.
his rights while he has an opportunity to assert them in a court
of justice, he cannot seek relief in another court. (Kohn v. ...)

that the lien of the bank's trust deed is prior to that of his judgment. The sufficiency of the evidence to establish the facts as found in the foreclosure decree cannot be controverted in a bill in the nature of a bill of review. (Clark v. Waggoner, 283 Ill. 199; Fellers v. Rainey, supra; Burgess v. Pope, 92 Ill. 255; Vyverberg v. Vyverberg, 310 Ill. 599.) A bill of review is in the nature of a writ of error, and is brought for error of law apparent on the face of the decree and for the purpose of the review. Vyverberg v. Vyverberg, supra; Palenske v. Palenske, 281 Ill. 574; Regner v. Hoover, supra.) The question is not whether the facts found in the decree under review are in accordance with the evidence, but whether the court correctly applied the law to the facts found by it. If the findings of the court upon matters of fact are not supported by the evidence, the remedy is by appeal or writ of error, and not by a bill of review. (Vyverberg v. Vyverberg, supra; Regner v. Hoover, supra.)

There is no error apparent upon the face of the foreclosure decree and nothing in the bill of complaint in this cause to show that any fraud was practiced upon Drury. The chancellor erred in overruling the demurrer of appellant bank and in entering the decree it did. That decree is therefore reversed and the cause remanded with directions to sustain the demurrer and dismiss the bill for want of equity.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

6
AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2551A. 819

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

REX SLATER AND LUCILLE
BUSHONG,

Appellants

vs.

FEDERAL LIFE INSURANCE
COMPANY,

Appellee

Appeal from the
Circuit Court of
Knox County.

Jett, J.

This is a suit instituted by Rex Slater and Lucille Bushong, appellants, against Federal Life Insurance Company, appellee, upon a policy of insurance issued by the appellee, dated September 14, 1926, upon the life of Pauline Belle Slater, said policy extending for a period of twelve months from September 14, 1926.

The original declaration filed by the appellants consisted of one count. A demurrer was filed by appellee to the original declaration, which was sustained by the court. Appellants took leave to amend their declaration, and filed three additional counts; a demurrer was filed by appellee to the third additional count; this demurrer was sustained, and it was amended and as amended a demurrer was again sustained to it and appellants elected to stand by the third amended count.

The amended third additional count, to which a demurrer was sustained, and by which county appellants elected to stand, avers in substance, the issuing of the policy of insurance and the delivery thereof to the insured, promising to pay to the beneficiaries Two Thousand Dollars in the event of the loss of the life of the insured, when the same was sustained by the wrecking or disablement of any vehicle or car operated by any private carrier or private person, in which the insured was riding, or by being accidentally thrown therefrom, including persons riding in or driving automobiles or any other motor driven or horse drawn vehicle, in case

of the death of the insured; then setting out the policy in ~~deac~~^{deac} verban concluding with the averment that the insured sustained injuries and suffered through being thrown from the seat of an automobile in which the insured was then and there riding, and thereby suffered injuries, external and internal, from which she died.

The demurrer to the third additional count~~x~~ was both general and special, the second special cause being that the amended third count failed to aver accidental injuries, against which the policy protected the insured, and the fourth special cause being that the count is double.

The first additional count~~x~~ avers that the insured sustained injuries by the wrecking or disablement of an automobile in which the insured was then and there riding, from the result of which injuries she afterward died. The second additional count~~x~~ avers that the insured sustained injuries by being accidentally thrown from said automobile and injured from the result of which injuries she afterwards died.

The plea of the general issue was filed to the first and second additional counts and a trial had upon the issues thereby formed. At the close of the testimony on the part of appellants the court instructed the jury to find for the defendant. The record as it stands, the single question raised by both the demurrer to the third additional count and the motion to direct a verdict, is whether or not under the terms of the policy declared upon, a recovery can be had by reason of death resulting from injuries from an accident wholly within an enclosed automobile, when the automobile is not injured, and when the insured was never in any sense out of the automobile. It is from this record that the appellants have prosecuted this appeal.

The policy in question was ~~web~~ what is known at the "Tribune Dollar Policy", issued by the appellee Company. The contingencies must naturally be very limited. It is a matter of common knowledge that in all classes of insurance, and especially in life and accident insurance contracts a great variety of contingencies are insured against and the premiums adjusted according to

of the death of the insured; then advised that the policy was

verbal agreement with the agent and that the insured was

injured and a check for \$10,000 was paid to the agent and

automobile in which the insured was killed and the agent

by certain injuries, and that the agent was

the agent in the fact that the agent was

generally and overall, the agent was not doing what the insured

third count failed to aver as stated in the first, and that the

policy was not the insured, and the agent was not doing

that the count is invalid.

The first additional count states that the insured

sustained injuries by the explosion of a bomb which

in which the insured was seen and there was a

which injuries the insured died. The second additional count

that the insured sustained injuries by being killed in a

said automobile and injured first

afterwards died.

The third of the second count is that the first

and second additional counts and a third had been the basis of

formed. At the close of the testimony on the part of the plaintiff the

count instructed the jury to find for the defendant. The court

it stands, the single question raised by the testimony is

third additional count and the action to which a verdict. In

or not under the terms of the policy declared upon, a recovery can

be had by reason of death resulting from injuries to an insured

wholly within an enclosed automobile, when the automobile is not

injured, and then the insured was seen in the automobile of the

automobile. It is from this record that the appellate have now

reversed this verdict.

The policy in question was for \$10,000 and was

"Trinity Motor Policy", issued by the Trinity Motor

companies most notably as very limited. It is a policy of

common knowledge that in all classes of insurance, and in particular

in life and accident insurance companies a contract is made with a

policy and insured against and the policy is not intended according to

contingency covered by the contract.

The deceased was riding in a closed automobile which ran over a bump or raised place in the road-way. The evidence establishes the fact that the insured was thrown from the seat against the top of the automobile, no part of her body having been thrown from the automobile; that she was never out of the car, or any part of her body out of the car, from the time just preceding the injury until she arrived at her home over a mile away.

The contract of insurance provides that claim for loss of life would be paid if caused by the wrecking or disablement of an automobile, or if the insured should suffer death by being thrown therefrom. There was therefore, no issue to be submitted to the jury and nothing for the jury to decide.

The only question therefore in the case, is whether or not, under the provisions of the policy, as above set forth, any liability accrued ⁴⁴ to the appellants. The provision is clear and unambiguous. It provides for insurance or indemnity where death has been sustained by the wrecking or disablement of a vehicle, or by being accidentally thrown therefrom. It is conceded that the insured did not come to her death from either cause. The car was not wrecked or disabled, nor was she accidentally thrown therefrom. Her death resulted from another cause not covered by the provisions of the policy. We have investigated the authorities relied upon by the appellants in this case.

In view of what is disclosed by the record, and the law as we understand it, arising out of the facts, there can be no recovery and the judgment of the Circuit Court of Knox County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

7

AT A TERM OF THE APPELLATE COURT,

17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 LA. 619²

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The People of the State
of Illinois,

Deft. in error,

Error to the County Court of
Lee County.

8182

vs.

Michael Gleason,

Pltf. in error,

February Term, 1930.

Jett, J.

Michael Gleason, plaintiff in error, was convicted in the county court of Lee County, for operating a dance hall without having a permit from the county board of said county, and was sentenced to pay a fine of \$100.00, and costs of prosecution, and to stand committed until the fine and costs were paid. Plaintiff in error sued out a writ of error to have the record reviewed.

It appears that on May ²⁷~~28~~th, 1929, plaintiff in error and others, obtained articles of incorporation from the Secretary of State for the Van Petten Community Social and ~~the~~ Entertainment Club. The object of the corporation was for social and amusement purposes and was organized as a corporation, not for pecuniary profit. It appears that the charter was granted issued by the Secretary of State, and forwarded to the attorney who did the legal work to incorporate the ~~the~~ corporation.

The statute provides that when a charter for such a corporation has been issued, it shall be recorded in the office of the Recorder of Deeds in the county where its principal business is conducted. The rule is that the corporation is not authorized to transact the business for which it was organized until the charter has been recorded in the office of the recorder. It is not claimed that the charter, at the time of the filing of the information in this cause, had been entered of record, as provided by the statute. Plaintiff in error and his assistants proceeded,

however, to give a dance, a membership fee was charged, and plaintiff in error assisted in selling membership cards.

The sheriff of Lee County and two deputies were present, and after having observed the character of business, in which the plaintiff in error was engaged, asked him if he had a license? Plaintiff in error replied that he did not have, but that he had a charter which did away with the necessity of a license.

It is the contention of the plaintiff in error that the dance was given by the corporation. It is argued by him that the incorporation of the organization was completed on June 9th, 1929, at the time the entertainment at the pavillinn in question, was held. This contention cannot be sustained.

Corporations, not for pecuniary profit, are not duly organized and authorized to do business, until after its charter has been recorded in the office of the recorder, where its principal business is conducted. Revised Statutes, Chapter 32, Sec. 30, Smith-Hurd's 1929, page 751; People v. Mackey, 255 Ill. 144.

The contention, therefore of the plaintiff in error, that the dance was given by the corporation and not by him, cannot be sustained. The corporation had no authority to give the dance. The evidence shows conclusively that the plaintiff in error was engaged in operating a dance hall without any permit from the County Board of Lee County.

The judgment of the County Court of Lee County is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty _____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JUN 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

WALTER TUCKER,

Appellee

vs.

HALL MOTOR COMPANY, a
Corporation,

Appellant

Appeal from the
Circuit Court of
Winnebago County.

February Term, 1930.

Jett, J.

This is an appeal by Hall Motor Company, a corporation, appellant, hereinafter referred to as the defendant, from a judgment rendered against it for \$215.00 in favor of Walter Tucker, appellee, hereinafter called plaintiff, growing out of a contract entered into on June 11, 1926, in which the plaintiff traded in his second hand Ford car to the defendant at an agreed price of \$215.00, as part payment for the purchase of a new Ford car.

The amended declaration averred that the plaintiff bargained on June 11, 1926, to buy a new Ford sedan from the defendant which defendant fraudulently and falsely warranted to be new and unused where as the sedan was actually a used automobile worth much less than a new car; that defendant fraudulently and falsely represented to plaintiff that the car was in first class mechanical condition and that the upholstery was in first class condition, where in truth, said car was a used car and the representations that it was new and that it was in first class mechanical condition, and that the upholstery was in first class condition were false and untrue, and known to be false and untrue by the defendant; that the car in fact had a great grinding noise in the back-end, had a knock in the engine and there was a mark on the radiator shell made by the rubbing action of the radiator hood; that plaintiff would not have bought the car but for the representations aforesaid and believed the same to be

true and thereupon purchased said car and turned in the plaintiff's own Ford sedan at an agreed price of \$215.00; that the automobile purchased by the plaintiff became greatly diminished in value and that the next day after the sale the plaintiff notified the defendant and offered to return the car in as good condition as it was at the time of the sale, and that the defendant then promised to fix said car to run in first class shape, and although the car was returned to the defendant six or seven times, it did not fix the same and at all times the car had a knock in the engine and a grinding noise in the rear axle housings and the upholstery was torn from the door and soiled, and a mark was on the radiator shell, and that one week after buying the car the plaintiff returned the same to the defendant and demanded the return of the used car which the plaintiff had delivered to the defendant, and that the defendant refused to return said used car to the plaintiff.

The principal issue is whether the car was in fact a used car or a new car and whether the representations constituted fraud. It will be observed that the declaration charges that plaintiff purchased a new Ford sedan from the defendant. The record discloses that the plaintiff gave an order for the car which states that the car was to be a new one. The evidence shows that the plaintiff took the car away and in a few days thereafter returned it complaining of a knock in the engine and of other defects. The agents of the defendant examined the car, admitted the noise and endeavored to fix it. The efforts were unsuccessful in the main and the car was frequently returned to the defendant on account of the trouble and finally plaintiff left it at the defendant's place of business and demanded a return of his money. The plaintiff claimed that in addition to the defects complained of the car was not new when he bought it and that it showed wear at various places and that the cushions were soiled.

The jury heard the evidence and found in favor of the plaintiff on the question of fact involved.

The rule is well established that the Court will not

set aside a verdict of a jury unless it is manifestly against the weight of the evidence. We have examined the evidence. The finding of the jury is not against the manifest weight of the testimony.

The chief complaint arises out of the instructions given and modified by the Court. The Court in effect told the jury that the defendant being a dealer in new cars and having sold the car in question to the plaintiff was bound to know that it was a new car and that his representations in that regard were true. It is insisted by the defendant that the instruction of the court in that regard was error for the reason that it omits the element of scienter. We are of the opinion that the ruling of the Court in this respect was correct and that in a cause of this character where representations are made of substantial matters it was the duty of the seller to know that his statement was true or false and where representations relate to facts which must be supposed to be within the knowledge of the seller, proof of their falsity is a sufficient showing of his knowledge that they were false.

It is well settled that it is immaterial whether a party misrepresenting a material fact knows it to be false, or makes the assertion of a fact without knowing it to be true. The affirmation of what one does not know to be true is unjustifiable, and if another act upon it, he who induced the action must suffer. So it has been held that, where the representations relate to facts which must be supposed to be within the knowledge of the defendant, proof of their falsity is sufficient showing of his knowledge that they were false. *Rowe vs. Phillips*, 214 Ill. App. 582-595.

In view of the facts as disclosed by the record and of the rule as we understand it arising out of the facts we decline to interfere with the verdict of the jury and the judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

9

AT A TERM OF THE APPELLATE COURT,

7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Présent--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice. 258 I.A. 619⁴

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

JUN 11 1930
Clerk's office of said Court, in the words and figures
following, to-wit:

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

Vs.

GUY JONES,

Plaintiff in Error,

Error to
Circuit Court
of Whiteside County.

This is a prosecution by indictment charging violations of the Prohibition Act. The defendant was found guilty under the first and third counts. The first county charged unlawful possession and the third count charged unlawful selling. Defendant was sentenced to the county jail of Whiteside county for a term of six months under the first county and to pay a fine of \$800 under the third count. From that judgment this writ of error is prosecuted.

Before the jury was impanelled, defendant filed his petition to impound all of the articles obtained by the sheriff under a search warrant issued by a justice of the peace. The affidavit for the search warrant alleged that the affiant has just and reasonable grounds to believe and does believe that intoxicating liquor containing more than one-half of one per cent of alcohol by volume is now unlawfully * * * * * possessed, and kept for sale, for beverage purposes within prohibition territory, in violation of the Illinois Prohibition Act, without first having obtained a permit therefor from the Attorney General of the State of Illinois. The reason stated for affiant's belief is that affiant, on the 23rd day of March A.D. 1929, personally purchased intoxicating liquor containing more than one-half of one per cent of alcohol by volume for beverage purposes of the premises occupied by the defendant and described in the complaint.

Defendant contends that his petition to impound all property taken by the sheriff under the warrant should have been granted, because the allegation concerning the lack of a permit ~~from~~ the Attorney-General is not a statement of fact, but a conclusion. The allegation was unnecessary. The Illinois Prohibition Act prohibits the sale of intoxicating liquor for beverage purposes without exception or reservation. An allegation that

that intoxicating liquor was sold for beverage purposes need not aver that such sale was without a permit from the Attorney-General. (People v. McClary, 240 Ill. App. 261.)

It is also urged that the affidavit is insufficient in that it does not charge the intoxicating liquor was fit for beverage purposes. The term "Intoxicating liquor" signifies that it is potable or fit for beverage purposes. (People v. Cioppi, 322 Ill. 353.) An information under Section 3 of the Illinois Prohibition Act, charging the unlawful possession and sale of intoxicating liquor, need not specify the kind of liquor sold or allege that it was fit for use as a beverage. The statute has defined the term "intoxicating liquor" and the defendant so charged is sufficiently informed of the nature of the charge. (People v. San Filippo, 243 Ill. App. 146; People v. Olive, supra; People v. Alfano, 322 Ill. 384.) An affidavit for a search warrant is not the basis of a criminal prosecution. (People v. Daugherty, 324 Ill. 160; People v. Holton, 326 id. 481.) Technicalities not required in an indictment are certainly not necessary in a complaint for a search warrant. (People v. Zalapi, 321 Ill. 484 (492).)

Two bottles of liquor were admitted in evidence, identified as People's Exhibits "20" and "22". A chemist testified that they contained 100% alcohol by volume at the time of their analysis. Defendant insists that the record fails to show that they were kept inviolate from the time they were purchased until they were analyzed, and were therefore not admissible in evidence. However the facts may be as to the preservation of the liquor in the two bottles mentioned, the record discloses that there were found on appellant's premises 19 gallon cans of alcohol, 3 full 10 gallon kegs of whiskey, 2 partly full 5 gallon kegs of whiskey, 14 bottles of cordial, and 9 cases of bottled beer, besides other intoxicating liquors, cases of bottles, a quantity of corks, and other material and implements incident to the business of dealing in intoxicating liquor. The witness who purchased the two bottles of liquor testified that when he

the information that was given to the jury in the case of the defendant.

(People v. [redacted], 340 Ill. App. 3d 1000, 1001.)

It is also noted that the defendant's testimony was not

in this case a matter of fact, but a matter of opinion.

It is noted that the defendant's testimony was not

in this case a matter of fact, but a matter of opinion.

Prohibition Act, Chapter 110, Section 1, and the

Interlocking Lines, need not be a matter of fact, but

it is noted that the defendant's testimony was not

in this case a matter of fact, but a matter of opinion.

It is noted that the defendant's testimony was not

(People v. [redacted], 340 Ill. App. 3d 1000, 1001.)

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in this case a matter of fact, but a matter of opinion.

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in this case a matter of fact, but a matter of opinion.

It is noted that the defendant's testimony was not

in this case a matter of fact, but a matter of opinion.

took them home, he drank from each of them and that they each contained intoxicating liquor. He also testified that he purchased intoxicating liquor from the defendant on two other occasions and another witness testified to two similar purchases. Even if it be conceded that the two exhibits were not properly preserved after the witness drank from them and were improperly admitted in evidence, yet in view of the other conclusive evidence of defendant's guilt, it is apparent that if the exhibits were excluded, no different result might be expected. The error, if any, would not justify a reversal. (People v. Weir, 295 Ill. 268). What we have said also applies to the admission in evidence of bottles with labels pasted over the corks. The matter written upon the labels was otherwise proved by competent evidence.

The admission of evidence showing sales on dates not charged in the indictment was not error. The time of the commission of the offense was not of its essence and it was not necessary to prove it as laid. It was sufficient to lay the offense on any day within the statutory limits and to prove it on that day or any other day within the limitation period. When proof of other offenses tends to prove the charge in the indictment, such proof is admissible. (People v. Olive, supra.)

The Court unduly limited the cross examination of a paid investigator. Considerable latitude should be allowed in such cases, (People v. Franklin, 257 Ill. App. 7), but in this case it is obvious that the defendant suffered no injustice by the court's rulings.

We have examined all of the instructions tendered and are of the opinion that no reversible error was committed by the trial court and that substantial justice was done.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

10 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 I.A. 620

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Charles Moore,

appellee,

vs.

George Barrett,

appellant,

Appeal from the Circuit Court
of Woodford County.

JONES, J:

This is a suit in assumpsit by Charles Moore, against George Barrett, for services and expenses incurred by Moore in connection with such services. The declaration consisted of the common count⁴. The bill of particulars stated that the services were rendered from December 3, 1927, to April 11, 1928, in assisting Barrett and his attorneys and agents in preparing for the trial of the case of George Barrett, et al v. Fred Barrett, et al, in the circuit court of Woodford County, - - 18 weeks at \$50.00 a week; and \$180 for expenses, making a total of \$1080, with a credit for payments of \$65.00, leaving a balance due of \$1015. The general issue was filed and the jury returned a verdict for \$621 in favor of Moore. Judgment was entered on the verdict for \$621 and this appeal is prosecuted.

The litigation referred to in the bill of particulars was a suit to contest the will of Robert Barrett, deceased, father of the defendant. George Barrett, the defendant in this case, was the contestant in that case. The trial of the will contest terminated adversely to the contestant.

On the trial of the instant case, Moore testified to conversations with Barrett, tending to show that he was employed by Barrett to interview witnesses and make investigations in connection with the will contest. The conversations and the employment were denied by defendant. Moore further testified that in pursuance of his employment, he interviewed a large number of prospective witnesses, the names of some of whom

Charles Morris

from the time of the
of the County.

This is a suit in equity by Charles Morris, against
George Barnett, for services, and expenses incurred by Morris in
connection with such services. The defendant contends that
the bill of particulars is correct and that the services
were rendered from December 3, 1938, to April 11, 1939, in and
about the County of Madison, Wisconsin, and against the
defendant and his attorney and agents in connection with the
trial of the case of George Barnett, et al. v. Charles Morris, et al.
in the Circuit Court of Madison County, Wisconsin, at \$50.00
a week; and \$150 for expenses, making a total of \$1050, with a
credit for payments of \$65.00, leaving a balance due of \$985.
The general issue was tried and the jury returned a verdict for
\$985 in favor of Morris. Judgment was entered on the verdict for
\$985 and this appeal is prosecuted.

The litigation referred to in the bill of particulars was
a suit to enforce the will of Robert Barnett, deceased, Father
of the defendant, George Barnett, et al. The defendant in this case, was
the contestant in that case. The trial of the will contest was
terminated adversely to the contestant.

On the trial of the instant case, Morris testified to con-
versations with Barnett, tending to show that he was employed by
Barnett to interview witnesses and make investigations in con-
nection with the will contest. The conversations and the em-
ployment were denied by defendant. Morris further testified
that in pursuance of his employment, he interviewed a large
number of prospective witnesses, the names of some of whom

were suggested by the defendant for that purpose. Eight witnesses testified to such interviews. Plaintiff also testified that defendant, by his son, Eugene Barrett, paid him various sums of money on account. Defendant and his son both denied such payments. A number of witnesses testified that the reputation of plaintiff for truth and veracity is bad. A larger number of witnesses testified that his reputation for truth and veracity is good.

Whether there was such an employment, and if so, what the compensation was to be, were questions of fact for the jury. The evidence was close and the jury could have decided either way. If no prejudicial error appears in the record, then the judgment should be affirmed.

Defendant contends that the trial court committed error in allowing J. H. Laws to testify to a conversation he had with Moore, in which the witness gave the entire conversation. It is further contended that the court permitted Moore to detail his conversations with various witnesses interviewed by him. Considerable ~~A~~ttitude was allowed the witnesses in these particulars, but we cannot see how defendant was injuriously affected thereby. It was material to the issues to determine whether or not plaintiff had performed the services, which he claimed he was employed to perform. Proof of his interviews with witnesses in the will contest was competent and corroborative. In order to make such proof, it was important to call witnesses who had been interviewed and to ascertain if the interviews related to the subject matter of the controversy. The record discloses that the trial court endeavored to limit the examination of these witnesses as much as possible under the circumstances. Perhaps some statements could have been eliminated, but considering the record as it stands, we fail to find anything in the evidence which tended to prejudice or bias the jury against the defendant. The same comment may be made concerning plaintiff's conversations with detective Wyss.

were suggested by the defendant for that purpose. Light
witnesses testified to such incidents. Defendant also testi-
fied that defendant, at his own, private home, had had
various acts of money or property. Defendant was also
charged with possession. A number of witnesses testified that
defendant was present at the time and place in which the
number of witnesses testified that the defendant was present and
therefore is good.

Whether there was such an agreement, and if so, when
the conversation was to be, with defendant of that for the day.
The evidence was that the jury could not find that
it was probable that defendant was in the room, and that
should be sufficient.

Defendant's counsel may be able to establish that it
was not a result of a conversation at that time
in which the witness gave the entire conversation. It is likely
concluded that the court should find that the defendant
with various witnesses testified that the defendant was
was allowed the witness in the room, but no other use
for defendant was sufficiently affected. It was not
to the fact that the witness was not allowed to testify
the services, which he claimed to be engaged to perform,
of his interview with witness in the cell, and defendant
and corroborative. In order to make such proof, it was necessary
to call witnesses who had been interviewed and to establish in
the interview related to the subject matter of the conversation.
The record discloses that the trial court concluded that the
examination of these witnesses was such as to establish the dis-
crepancies. Perhaps some evidence would have been introduced,
but considering the record as it stands, we feel that the
fact in the evidence which tended to establish the fact
that the defendant. The same comment may be made regarding
a conversation with defendant.

The Sheriff of Woodford County was allowed to testify as to the reasonable and customary charge in that locality for services and expenses of investigators. His knowledge was gained in connection with prosecutions under the Prohibition Act. The evidence was not incompetent and its value was a matter for the jury.

The pleadings in this case did not limit the plaintiff to proof of an express contract. When a plaintiff does not declare upon an express contract, but upon the common counts, if the defendant denies the making of the express contract, plaintiff is not confined to proof of an express contract for a recovery, but may recover upon a quantum meruit, or upon any other grounds which he can establish; and any evidence which would be competent to establish his cause of action, in the absence of an express contract, is competent. This court so held in *Humphreys v. Orrey*, 220 Ill. App. 523. Evidence under a quantum meruit was proper and there was no error in permitting plaintiff to testify to the amounts expended for room rent, meals and bus fare.

Plaintiff testified to certain payments on account received by him from defendant's son, Eugene. This testimony was denied by Eugene and plaintiff was cross examined on the subject. The weight of the testimony was a question for the jury to decide. Plaintiff's Exhibit "1" was properly admitted. It was written to Moore by one of defendant's attorneys, in the will contest and strongly corroborated Moore's claim of employment.

We have examined the evidence and find no prejudicial error in the admission of any testimony to which objection is urged by defendant. A judgment will not be set aside unless the verdict is manifestly against the weight of the evidence. (*Peoria & Pekin Terminal Ry. Co. v. Shantz*, 130 Ill. App. 141). That cannot be said of this verdict. No complaint is made about the giving or refusing of instructions. From an examination of the record, we

find nothing to indicate that the jury was actuated by passion or prejudice. The verdict is not excessive and the judgment is accordingly affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty _____

Clerk of the Appellate Court

14 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2501A 020²

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 17 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

The People of the State
of Illinois,

Deft. in error,

vs.

Error to the County Court of
Winnebago County.

Joe Calderotta,

Pltf. in error,

Jett, J.

The State's Attorney of Winnebago County filed an information in the county court of said county, at the June term thereof, in the year 1929, in which it was charged that Joe Calderotta, the plaintiff in error, at and within the said county of Winnebago, did then and there unlawfully and wilfully cause and encourage one Harriett Josephson, a female then and there under the age of 18 years to be and become a delinquent child, as defined in an Act to define and punish the crime of contributing to the delinquency of children.

Plaintiff in error made a motion to quash the information, which was over ruled. Motion for a bill of particulars was filed by the plaintiff in error, and was overruled. To the information, Joe Calderotta, the plaintiff in error, entered a plea of not guilty. A jury trial was had resulting in a verdict finding him guilty in manner and form as charged in the information. Motions for a new trial and in arrest of judgment, were made and denied. Judgment was rendered on the verdict of the jury and the said plaintiff in error was sentenced to one year in the county jail of Winnebago County, and to pay a fine of one dollar, and to stand committed to the county jail until fine and costs were paid. Plaintiff in error sued out this writ of error.

The ground relied on by plaintiff in error for a reversal of the judgment is that the verdict of the jury is not supported by the evidence. The record shows that Harriett Josephson was on June 10, 1929 by the order of the county court of Winnebago county,

about 5000 ft. off shore

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declared to be a delinquent child, and released on probation to the probation officer of that court.

Harriett Josephson, on the trial, testified that she was 15 years of age; that she met plaintiff in error in August 1928, when she resided with her parents outside of the City of Rockford; that she had been with him during the months following while she was residing with her parents; that she had sexual intercourse with him on several occasions, three or four months after she first met him, that she had sexual intercourse with him five or six times after that; that in May 1929, while she was riding in a taxi-cab at night to her place of employment, the plaintiff in error with a friend, pursued in an automobile the taxi-cab, and at the point of a gun held by plaintiff in error, compelled her to get out of the taxi-cab; that she went with him on his promise to take her home, but instead of taking her to her place of employment, he compelled her to accompany him to his home in South Rockford, and there remain with him in the hall, all that night; that she never went out riding with plaintiff in error with her parents' consent, and never spent any time with him with her parents' consent.

Florence Stanton, a police woman of Rockford testified that on one occasion she was appealed to by Harriett Josephson, at night in front of a dance hall; she pointed to a machine in which there were two boys; that she put her on a street car.

Joseph Lapinski testified that on June 10, 1929, at five o'clock in the morning, he arrested Harriett Josephson immediately after she stepped out of an automobile in which she had been riding with plaintiff in error and another man, and took her to the police station. This was on the day on which the information was filed.

The plaintiff in error testified in his own behalf that he was 19 years of age. He admitted associating with and being out with Harriett Josephson many times, but denied having had sexual intercourse with her; and denied that he had ever been told she was 15 years of age except on one occasion in the State's Attorney's office on May 23rd, and that he had supposed she was 18 years of age;

that on the night of May 23rd, he met her and took her on a trip and didn't get home until after 4:30 the next morning. He admitted taking the girl to his home the night of the taxi-cab incident, early in May.

While it is conceded that the prosecuting witness testified that on several occasions plaintiff in error had intercourse with her, still it is contended that inasmuch as the plaintiff in error specifically denies having had such intercourse, that the verdict of the jury finding him guilty, was not supported by the evidence.

The record discloses that while plaintiff in error denied having had intercourse with the prosecuting witness, he admitted that he was with her on numerous occasions, and on one occasion of having been with her at night, and taking her to his home where she remained all night.

The record further shows that on another occasion plaintiff in error, the prosecuting witness and two other parties, had been out in a taxi, and that on this occasion the prosecuting witness was placed under arrest by the police officer, who testified that he saw the plaintiff in error in the taxi with the prosecuting witness.

The jury saw and heard the witnesses; they were the judges of the weight and credibility to give to the respective witnesses, and having found the plaintiff in error guilty, we are not prepared to say that they were not justified in so finding.

The testimony was conflicting; the prosecuting witness was in some material particulars corroborated by disinterested witnesses and by the plaintiff in error.

The court will not sustain a conviction on a criminal charge where the evidence is improbable, unsatisfactory or reasonably doubtful, but it will not substitute its judgment for that of a jury in merely weighing the credibility of witnesses where the testimony is

that on the night of May 1941, in New York and New Jersey, and also in the State of New York, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

The second group of persons who were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

The second group of persons who were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

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That on several occasions during the year 1941, the following persons were present, to-wit:

That on several occasions during the year 1941, the following persons were present, to-wit:

conflicting.

People v. Binger, 289 Ill. 582-586;

People v. McCann, 247 Ill. 130;

People v. Conners, 246 Ill. 9;

People v. Feinberg, 237 Ill. 348.

There are no complaints made as to the ruling of the court on the instructions, or with reference to the rulings on the admissibility of evidence.

The judgment of conviction is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

15 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk. 2501A 620³

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 17 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MARGARET UMBDENSTOCK,	:	
Administrator of the Estate	:	
of John Umbdenstock,	:	
Appellee	:	An appeal from the
	:	Circuit Court of
	:	Du Page County.
vs.	:	
	:	
MALLOTT WHOLESALE GROCERY CO., a	:	
corporation,	:	
Appellant,	:	

JONES J:

Margaret Umbdenstock, administratrix of the estate of John Umbdenstock, deceased, recovered a judgment for \$4500 against Mallott Wholesale Grocery Company, for the death of her son, John Umbdenstock, as the result of injuries received by him two days previously, in a collision between a truck of the defendant company and a Ford automobile on which John was riding. An appeal is prosecuted from that judgment.

It is urged that the verdict of the jury is manifestly against the weight of the evidence. The defendant Company is engaged in the wholesale grocery business in Chicago, and makes delivery by truck to its customers adjacent to that city. On the day of the accident one of its trucks driven by John Floyd, an employee, was so engaged and arrived at the store of Lehman Brothers on North Forest Avenue, in Downers Grove, in the afternoon about dusk. The street in front of the Lehman store was paved to the width of 48 feet. Forest Avenue runs north and south and the store of Lehman Brothers is on the west side of it. The driver backed the truck up to the curb in front of the store and headed it northeast. It remained there about 15 minutes, while Floyd was delivering groceries to the store. When he had finished the delivery, he prepared to drive the truck away. Plaintiff's intestate, a boy 15 years of age, had been playing football with a number of other boys. He started home with Robert Burns, who drove a Ford

touring car north along the east side of Forest Avenue. Altogether eight boys boarded the car. Plaintiff's intestate stood on the running board on the left hand side of the car. It was driven about 15 miles an hour. When it reached a point in front of the store, defendant's truck started and was driven out across the center line of the street. The front part of the truck ran into the Ford car, crushing the intestate between the front end of the truck and the side of the car. The Ford was raised off its two left wheels, about a foot. Plaintiff's intestate was caught and held between the truck and the Ford. When the truck was backed up, he fell to the street alongside the Ford and in front of the truck. The impact mashed the front fender of the Ford, broke the running board, and tore off the rear fender.

The weight of the testimony shows that when the Ford car reached a point in front of the truck, the driver of the truck, without signal or warning of any kind, drove directly into the left side of the Ford car, causing the accident which resulted in the death of plaintiff's intestate. The driver of the truck testified that he looked down the street to the right before he started the truck and could see nothing for half a block, 100 feet or more; that he pulled the cord to sound his whistle and started the truck slowly in first speed, and that when he got about to the middle of the street headed in a northeasterly direction, the Ford came along and sideswiped the front of his truck. However, it appears he previously testified before a justice of the peace, that on account of the position of his truck when standing at the curb, he could see a car only about 20 or 25 feet to the south; and that he did not sound his horn before starting.

It is apparent that there is a conflict in the testimony, and in the absence of substantial error, it is well settled that a verdict will not be set aside, unless it is

clearly and manifestly against the weight of the evidence. We have examined the record in detail and are of the opinion that the verdict is not against the manifest weight of the evidence, but is supported by it.

It is urged that by standing on the running board of the car, the deceased voluntarily put himself in a place of danger, and thereby contributed to his own injury. We are unable to agree with such contention. It was not negligence per se for the deceased to stand upon the running board of the Ford car. It is idle to say that if he had been inside the car, he would not have been hurt. Such a statement argues no more than to say he would not have been hurt, if he had not been on the car at all. He was not wrongfully upon the running board, and it cannot be said that his standing there contributed to the cause of the accident. He was in a safe place but for the negligence of defendant. (Chi. Tel. Co. v. Com. Union Assur. Co., 131 Ill. App. 248.) The Ford was being driven upon the right hand side of the street where it belonged. Both the driver of the Ford and the deceased had the right to assume that defendant's servant would not turn from the southbound traffic lane on the west side of the street into the northbound traffic lane without giving due and timely notice of his intention to do it, and they were not guilty of negligence in acting upon such assumption. (O'Rourke v. Spraul, 241 Ill. 576; Carneghi v. Gerlock, 208 Ill. App. 340; Chi. Tel. Co. v. Com. Union Assur. Co., supra.)

The weight of the testimony shows that the defendant's truck was standing still until the Ford reached a point almost directly in front of it, and none of the occupants of the Ford saw the truck in motion in time to have avoided the accident. It is well established that knowledge of danger or threatened danger will not be imputed to a person who fails to look for danger which under the surrounding circumstances he had no reason to apprehend. (Chi. Tel. Co. v. Com. Union Assur. Co.,

supra; Mellish v. Thorne, 119 Ill. Appl 237; Miller v. Burch, 254 id. 387.) The testimony is convincing that plaintiff's intestate was not guilty of negligence, and that he was in the exercise of ordinary care for his own safety at and immediately before the accident.

If it be conceded that there is any testimony in the record tending to show negligence on the part of the driver of the Ford car, plaintiff's intestate being merely a passenger or guest in the automobile, and without control over it, or the driver, the negligence of the driver, if any, could not be imputed to him. (Bolin v. C. I. P. S. Co., 237 Ill. App. 226; Fisher v. Johnson, 236 id. 25.) This case does not belong to that class where the party injured in an accident had an opportunity to observe and warn the driver of impending danger and was negligent in not doing so.

Complaint is made of plaintiff's 2nd and 8th instructions which attempt to define "ordinary care". While they may be subject to some criticism, they direct no verdict, and the error, if any, when viewed in the light of the other proper instructions, was harmless and did not mislead the jury.

The trial court admitted certain testimony, upon the statement of plaintiff's counsel that he would later connect it up with other testimony. He failed to do so. The testimony should have been stricken, but it does not appear that the court's attention was again called to the matter and no motion to strike was thereafter made. Under the circumstances, appellant is not in a position to urge an objection now.

The record is free from substantial error and it seems to us, that even if the errors complained of were not present, the result of the trial would have been the same. The judgment is therefore affirmed.

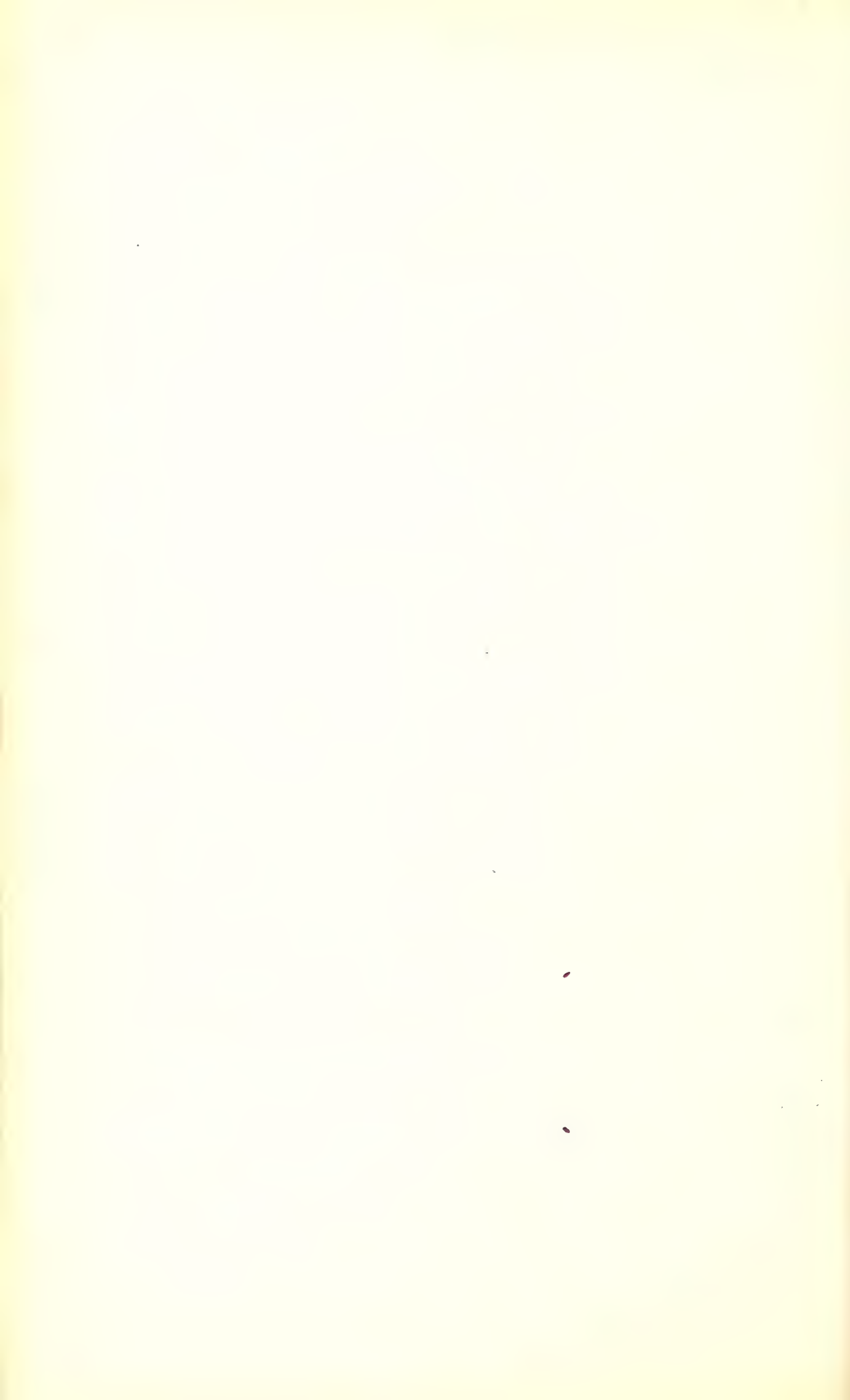
Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 LA 620⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 17 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

DANIEL KELLY,	:	
Appellee	:	
vs.	:	Appeal from the Circuit
	:	Court of Woodford County.
JOHN PALMER,	:	
Appellant,	:	

JONES J;

Daniel Kelly filed a suit in chancery against John Palmer. The bill alleges that prior to June 30, 1928, Kelly leased certain premises to Palmer for a period ending June 30, 1929 and he later leased them to Dr. Peters from said last mentioned date to June 30, 1930; that subsequent to June 30, 1929, it became the duty of Palmer to yield up the possession of the premises; that he failed to do so "but continues in the possession of the same and persists in exercising dominion and control over said real estate in the same manner exercised by him during the period of his lawful tenancy." The bill further alleges that ~~if~~ ^{the} appellant is permitted to continue in the possession of said real estate, that the lessee, Dr. Peters, threatens to terminate the lease made to him "and by reason of the premises, said real estate will depreciate in value to the irreparable damage of your orator, unless restrained by injunction"; also that said real estate is hunting and fishing grounds used for the purpose of recreation, "and that in order that your orator and the said subsequent lessee may enjoy the full pleasure and benefit of said real estate, it is necessary that your orator and said subsequent lessee enter upon the said real estate for the purpose of ~~plant~~ planting and seeding certain crops incident to the use of the said real estate as aforesaid."

The bill further alleges that divers other persons unknown to appellee have entered upon said real estate and in order to prevent further continuance thereof, it would require numerous actions at law against each of said persons

1. The first of these is the fact that the Bill is a measure of the Government's policy on the subject of the control of the press.

2. The second is the fact that the Bill is a measure of the Government's policy on the subject of the control of the press.

3. The third is the fact that the Bill is a measure of the Government's policy on the subject of the control of the press.

4. The fourth is the fact that the Bill is a measure of the Government's policy on the subject of the control of the press.

and a multiplicity of suits. The bill prays that Palmer and all those under him may be restrained by injunction from entering upon said real estate or exercising any right of possession, dominion, or control over it.

A temporary injunction was issued as prayed. Thereafter Palmer filed an answer and moved to dissolve the temporary injunction. The answer alleges that appellant had rented the premises from Kelly on June 30, 1926, for a period of one year for the purpose of the exclusive fishing, hunting, and trapping thereon; that said lease was in writing and was extended from time to time as a lease from year to year, until June 30, 1928, when it expired; that afterward on or about July 31, 1928, he entered into a new oral lease with appellee for a term of five years, beginning on said last named date, he to have exclusive use and occupation of the premises for hunting, fishing, and trapping purposes, the rental therefor to be \$400 for the first year and \$500 annually thereafter; that he paid appellee \$400 for the year ending July 31, 1929; that after the making of said oral lease, he went into possession of the premises under it, constructed a clubhouse at an approximate cost of \$1500, and furnished it for use in connection with the premises of his lease; that he has since continued in possession of the premises and the improvements; that on or about November 1, 1928, Kelly visited the premises, inspected and approved the clubhouse and other improvements, and ratified said oral lease and appellant's possession thereunder; that by reason of the alleged leasing to Dr. Peters, appellee has no right to maintain this suit; that if any person has an action, it is Dr. Peters, and denies the jurisdiction of the court to proceed by injunction or to permit the prosecution of this suit. A hearing was had on the motion. Evidence was introduced by the respective parties, and the court entered an order denying the motion to dissolve. This appeal is prosecuted from that order.

Inasmuch as the sole object of the bill is to obtain an injunction, and a motion was made to dissolve the injunction

upon the face of the bill, the order denying the motion was appealable. (Cahill v. Welch, 208 Ill. 57.)

According to the allegation of the bill the relation of landlord and tenant had existed between complainant and defendant and the defendant was holding over after the expiration of the lease. A cause of action arising out of such a state of facts is clearly cognizable at law under paragraph 4 of section 2 of the Forcible Entry and Detainer Act (Chap 57, Rev. Stat.) It provides that the person entitled to possession of lands or tenements may be restored thereto in the manner provided by said Act, "When any lease of the lands or tenements of any person holding under him holds possession without right after the determination of the lease or tenancy by its own limitation, condition, or terms, or by notice to quit, or otherwise."

It is elementary that equity has no jurisdiction where there is a plain, adequate, and complete remedy at law. If the well pleaded facts alleged in the bill of complaint are true, they disclose a case of Forcible Entry and Detainer, for which there is an adequate remedy at law, and a court of equity will not interfere by injunction. (Davis v. Hinton, 39 Ill. App. ³²⁷~~287~~; Wangelin v. Goe, 50 Ill. 459.) After the termination of a lease, the remedy of a party entitled to possession is by action at law to recover possession, rather than by bill in equity. (Walker v. Salz, 160 Ill. App. 581; Mitchell v. Hannah & Hogg, 181 id. 507.)

Complainant does not allege that he has covenanted to put Dr. Peters into possession under his alleged lease. When a landlord has made a new lease to a second tenant, he has no right to prosecute a suit for possession of the premises from the first tenant, unless he has covenanted with the second tenant to put him into possession. In the absence of such a covenant, the possessory action belongs solely to the second tenant. (Gazzolo v. Chambers, 73 Ill. 75; Grand Union Tea Company v. Hanna, 164 Ill. App. 570.)

Paragraph 15 of the Act relating to Injunctions (Sec. 15, Chap. 69, Rev. Stat.) provides that a motion to

dissolve an injunction may be made at any time upon answer or for want of equity on the face of the bill. Appellant's contention that the bill on its face shows no ground for equitable relief is preserved in both the answer and the motion to dissolve the injunction. Objection to the equity of the bill may be raised by answer. (Harley v. Sanitary District of Chicago, 54 Ill. App. 337; Chicago Pub. Stock Exchange v. McLaughry, 148 Ill. 372.) The motion to dissolve the injunction was made upon answer, based on the want of equity on the face of the bill. It had the same effect as a demurrer to the bill. (Wortham v. Quait, 215 Ill. App. 444; White v. Y. M. C. A., 233 Ill. 526.) As the bill was in substance for injunction only, without equity on its face, the chancellor should have dissolved the injunction and dismissed the bill, although an answer was on file. (Gardt v. Brown, 133 Ill. 475; American Livestock Commission Co. v. Chicago Livestock Exchange, 143 Ill. 210.) The dissolution of the injunction would in effect have disposed of the entire case. It would serve no useful purpose to retain the bill for a further hearing. A bill wholly insufficient on its face is not aided by proof. (Chicago Pub. Stock Exchange v. McLaughry, supra.)

The order of the trial court is reversed and the cause remanded with directions to dissolve the injunction and dismiss the bill for want of equity.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

17 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 17 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE PEOPLE OF THE STATE OF	:	
ILLINOIS, ex rel VERDA HESS,	:	
Appellee,	:	
	:	APPEAL FROM THE
vs.	:	COUNTY COURT OF
	:	MARSHALL COUNTY
JOE GUSMANO,	:	
Appellant,	:	

Jones J:

The County Court of Marshall County entered the judgment in the usual form against Joe Gusmano, adjudging him to be the father of the bastard child of Verda Hess. He has brought the cause to this court by appeal. No briefs have been filed on behalf of appellee. Under Rule 21 of this court, we would be justified in reversing the judgment pro forma, but we deem it best to dispose of it on another ground.

Section 4, Chapter 17, Revised Statutes, provides that the trial court at the next term after the arrest of the defendant shall cause an issue to be made up, whether the person charged, as aforesaid, is the real father of the child or not, which issue shall be tried by a jury. This court, in *People, ex rel, Loretta Clark v. Marcus Kays*, 241 Ill. App. 330, has held that the making up of such an issue in a bastardy case is mandatory and essential to the trial of a defendant. In the case at bar, the defendant was not called upon to plead and no steps were taken to cause an issue of fact to be made up-- consequently, no issue was made up and no triable fact was properly submitted to the jury.

In *People v. Kays*, supra, it was held that the failure to make up an issue before trial was reversible error. It is therefore unnecessary to consider other assignments of error, and the jury judgment is reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

76
7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2531.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 7 1

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE MATTER OF THE ESTATE OF
WARREN BUSHNELL, deceased, et al.

vs.

Harry J. Cooper,

Respondent.

APPEAL FROM THE
COURT OF CHANCERY

A decision in this case is controlled by what we have said in In the Matter of the Estate of Warren Bushnell, deceased, et al, v. Harry J. Cooper, Gen. No. 8188, and this case is reversed and remanded with directions to the chancellor to set aside and vacate the order appointing appellee trustee.

Reversed and remanded with

costs.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

11,7980
AT A TERM OF THE APPELLATE COURT,

4

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 I.A. 691²

BE IT REMEMBERED, that afterwards, to-wit: On
JUL 15 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



EMILIO AMIDEI,

Appellee

vs.

NICK BRANDONISIO,

Appellant.

ALFONSO DIGANI,

Appellee

vs.

NICK BRANDONISIO,

Appellant.

Appeal from the Circuit
Court of Lake County.

LINO CABRI,

Appellee,

vs.

NICK BRANDONISIO

Appellant.

Jett, J.

Emilio Amidei, appellee, Alfonso Digani, appellee, and Lino Cabri, appellee, each instituted a ~~suit~~^{case} in assumpsit in the Circuit Court of Lake County against Nick Brandonisio, appellant, to recover the sum of \$400.00 respectively, being the amount averred by each of them to have been paid to the appellant with which to pay taxes and special assessments on certain lots in Highwood Grove Sub-division which appellant had sold to appellees as evidenced by a certain written contract that was admitted in evidence.

The declarations of the respective appellees consist of the common counts, to which the appellant pleaded the general issue. The three cases were by stipulation and order of the court consolidated and tried without the intervention of a jury. The trial court found for appellees and rendered judgment

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in favor of each of them for the sum of \$400.00 against the appellant.

Appellant prosecutes this appeal. In this court the three cases were consolidated and heard together. The three cases were submitted substantially upon the same facts.

On the trial appellees in each suit offered in evidence a written contract entered into by them with appellant in and by which contracts appellant sold to appellees respectively the lots in said sub-division for a certain named sum. Terms of payment were set forth in said contract. The contract is as follows:

"Articles of agreement, dated February 18, 1927, between Nick Brandonisio, party of the first part, and Emilio Amidei, party of the second part, recites that if second party make payments and perform covenants, first party covenants to convey and assure to said second party, in fee simple, clear of incumbrance, by warranty deed Lot 6 of Highwood Grove Sub-division, second party covenants and agrees to pay first party \$8,900, as follows: \$1,000 ~~cash~~ on delivery of contract \$2,000 when building is completed and balance \$50 a month or more till whole sum is paid, interest to start when house is completed.

First party agrees to sell and build two-story building (here follows description of and materials for such building)

(Signed) Nick Brandonisio

(Signed) Emilio Amidei.

(Then continues): With interest at 6%, payable monthly, on whole sum remaining unpaid from time to time and to pay all taxes, assessments, or impositions, legally levied or imposed upon said land subsequent to 1926; in case of failure of second party, to make either of the payments or part thereof or perform any of the covenants made and entered into, contract shall at option of first party, be forfeited and determined and second party shall forfeit all payments by him on the contract

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Notes on the Catalogue, p. 2.

and such payments shall be retained by first party in full satisfaction and liquidation of damages by him sustained and shall have the right to reenter and take possession of said premises.

See copy attached for described building. Complete abstract of title or guaranty policy to be furnished by grantor within reasonable time, with continuation.

Mutually agreed that time of payment shall be essence of contract and all covenants agreements extend to and obligatory upon heirs, etc.

Witness hands and seals of parties, day and year first above written.

Nick Brandonisio (Seal)
Emilio Amidei (Seal)

In presence of Casper Santi."

It will be seen that the contract in question contained this provision "That the grantee, (that is appellees) pay all taxes, assessments or impositions legally levied or imposed upon said land subsequent to 1926."

The trial court over the objection of appellant permitted appellees to offer in evidence oral testimony to the effect that \$400.00 of the consideration in each of the contracts was paid appellant under his agreement to pay the taxes and assessments levied against each of said lots prior to 1926.

Appellees contend that since the contract provided that they should pay the taxes and assessments after the year 1926, it in legal effect follows that appellant should pay the taxes and assessments prior to and including 1926.

Under the rule as we understand it all oral conversations were merged in the written contracts and the parties must be governed by the contracts they entered into in writing. The evidence fails to show that any payment was made to appellant other than the consideration named in the respective contracts. Since the written contract does not provide that \$400.00 or any part of said consideration was to be used by appellant to pay the special assessments and general taxes which accrued against said lots prior to 1926 it cannot be shown. In passing it might

and such payments should be retained by the party in full satisfaction
and liquidation of claims by him contained and shall have the
right to recover and take possession of said premises.
See copy attached for described building. Contests

abstract of title or guaranty policy to be

abstractly annexed that time of payment shall be deferred
of contract and all covenants agreements extend to and all payments
upon debts, etc.

Witness hands and seals of parties, this 2nd day
first above written.

In presence of Joseph Smith.

It will be seen that the contract in question contained
this provision "That the payment, (that is to say) pay off balance,
assessments or liabilities legally levied or imposed upon said
land subsequent to 1888."

The trial court over the objection of applicant
permitted applicant to offer in evidence oral testimony to the
effect that \$400.00 of the consideration in each of the contracts
was paid applicant under his agreement to pay the taxes and assess-
ments levied against each of said lots prior to 1888.

that they should pay the taxes and assessments after the year
1888, it in legal effect follows that applicant should pay the
taxes and assessments prior to and including 1888.

Under the rule as we understand it all oral testi-
monies were rejected by the written contract and the parties
must be governed by the contracts they entered into in writing.
The evidence fails to show that any payment was made to applicant
other than the consideration named in the respective contracts.

Since the written contract does not provide that \$400.00 or
any part of said consideration was to be used by applicant to
pay the special assessments and general taxes which accrued against
said lots prior to 1888 it cannot be shown. In passing it might

be well to say that even if appellees were entitled to make such showing the record fails to disclose that they in fact did pay any of the assessments that accrued on said premises prior to 1926, which they would have had to pay before they could bring suit against the appellant to recover therefor. The record does show, however, that certain of the taxes or assessments accrued prior to 1926, were paid by appellant.

Numerous authorities have been cited by the respective parties bearing upon the question of the admissibility of evidence admitted by the court relative to the \$400.00, items contended for by the respective appellees. It is unnecessary to cite authorities to the effect that a written contract unambiguous in its terms cannot be varied, contradicted or modified by parol evidence.

We conclude, therefore, that the only consideration that was paid by appellees to appellant as disclosed by the record was that named in the respective contracts.

We are of the opinion, therefore, that the judgment of the circuit court of Lake County should be reversed and the cause remanded in each of said causes, which is accordingly done.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Robert

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

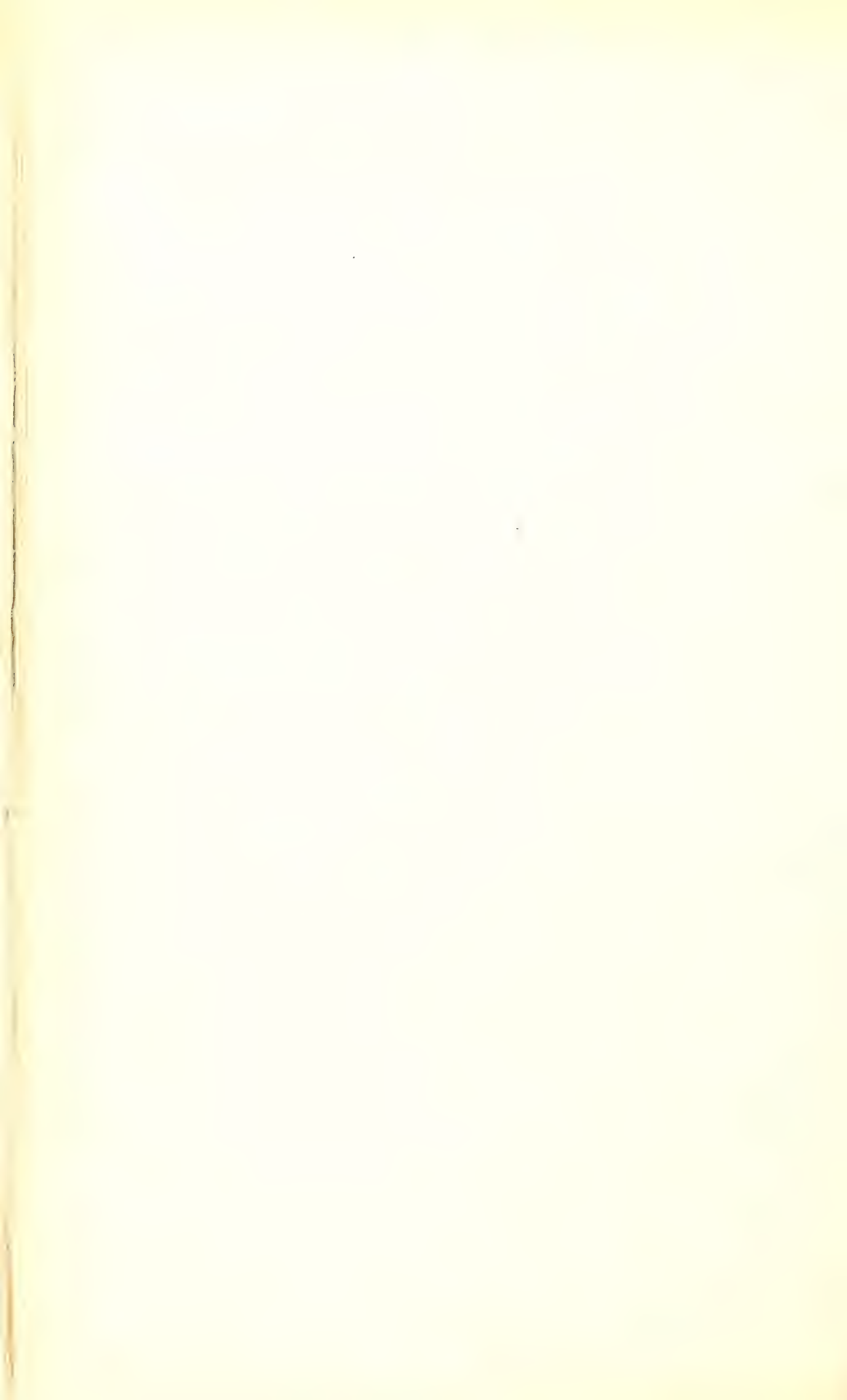
JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

256 LA 621³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 19 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



OSCAR HAEBERLE, Trustee, etc.,
Appellee
-vs-
COMMONWEALTH SILICA CO., et al.
(Rumsey & Company,
Appellant)

Appeal from the Circuit
Court of LaSalle

OCTOBER TERM, 1929.

Jett, F. J.

On February 28, 1919, Commonwealth Silica Company executed two trust deeds on seventy-six acres of sand land in LaSalle County, one creating a first lien thereon to secure the payment of notes for the principal sum of Six Thousand Dollars, the other created a second lien to secure the payment of ten notes aggregating Twenty Thousand Five Hundred Dollars. All of these ten notes were dated February 28, 1919, nine of them were for \$1500.00, each and one of them matured on July, 1, and January 1, of each year thereafter to and including July 1, 1923, the remaining note was for the sum of \$7000.00, and became due January 1, 1924. On December 31, 1925, Appellee, Oscar Haeberle as Trustee filed his bill to foreclose these two trust deeds, alleging that the First National Bank of Ottawa was the owner and holder of these notes, but that Rumsey and Company, a corporation, John H. Holmes, Robert I. Thornton and Carl E. Saylor have or claim some interest therein. No service was had upon Holmes or upon ~~Helm~~ Rumsey and Company. The First National Bank of Ottawa, Commonwealth Silica Company and Saylor filed answers, and the Silica Company and Saylor filed a cross-bill, setting up a contract and a former decree of specific performance hereinafter referred to, and alleging that by reason of a failure upon the part of Thornton to perform thereunder, he is estopped from demanding payment of any of the notes so executed by the Silica Company to him. On June 25, 1928, a decree was rendered finding that the Commonwealth Silica Company being indebted in the sum of \$6000.00, executed its first trust deed to secure the

payment thereof as set forth in the bill and that the notes evidencing such indebtedness were then held and owned by the First National Bank of Ottawa: that the Commonwealth Silica Company was indebted to Robert I. Thornton and executed and delivered its notes to him for the principal sum of \$20,500.00, and also executed its trust deed to secure the payment thereof as set forth in the bill: that Thornton being indebted to said First National Bank of Ottawa in the principal sum of ^{\$8930.00} ~~\$335000~~ delivered said notes aggregating \$20,500.00, to it as collateral security therefor; that the Commonwealth Silica Company and Thornton, on November 1, 1920, entered into an agreement in which the Silica Company agreed to convey the land covered by the trust deeds to Thornton upon the payment of said notes, aggregating \$20,500.00, and upon the performance of certain other agreements: that Thornton did not carry out his part of said agreement to purchase, but on June 1, 1923, filed his bill alleging that he was the owner of the notes aggregating \$20,500.00 and praying for a foreclosure of said trust deed. This decree then sets forth at length the decree which was rendered in that case on June 30, 1924, the Commonwealth Silica Company having filed its answer and a cross-bill for the specific performance by Thornton of the contract of November 1, 1920. By this decree of June 30, 1924, the original bill of Thornton was dismissed and a decree directing Robert I. Thornton to specifically perform the contract of November 1, 1920, was entered on the cross-bill. This decree of June 25, 1928, then finds that the decree of June 30, 1924, was amended on July 13, 1925, and as amended provided that if Thornton failed to perform as in the decree provided within 90 days from that date, he, Thornton, should have no further right or interest in the premises. This decree of June 25, 1928, then finds that Robert I. Thornton did not carry out the provisions of the decree of June 30, 1924, as so amended, but orders that said trust deed be foreclosed for the sum of \$11,907.80, being the amount due the First National Bank of Ottawa from Thornton upon the notes so assigned to it, and orders the Silica Company to further pay the First National

payment thereof as set forth in the Bill and for the same reason
during each subsequent year until the full amount of the
National Bank of Ottawa; that the National Bank of Ottawa
indebted to Robert I. Thomson and executed and
notes to him for the principal sum of \$100,000.00, and also executed
its trust deed to secure the payment thereof as set forth in the
Bill; that Thomson being indebted to said National Bank of
Ottawa in the principal sum of \$100,000.00, and also executed
a promissory note, for the principal sum of \$100,000.00, to the National Bank of
Ottawa, and the National Bank of Ottawa, on November 1
1900, entered into an agreement in which the National Bank of Ottawa
to convey the land covered by the trust deed to Thomson upon
the payment of said note, amounting to \$100,000.00, and upon the
performance of certain other agreements; that Thomson did not
carry out the part of said agreement to purchase the land, but
1903, failed to file the Bill of Sale and the Bill of Mortgage
amounting to \$100,000.00 and failing to do so Thomson was held
dead. This decision was affirmed by the Court of Appeal and was
rendered in that case on June 3, 1904, and the National Bank of
Ottawa having filed the appeal and a cross-bill for a declaration
of the validity of the contract of November 1, 1900, by
this decree of June 30, 1904, the original bill of Thomson was
dismissed and a decree nisi was entered in favor of Thomson for
return the contract of November 1, 1900, was annulled as to the
cross-bill. This decree of June 30, 1904, then stated that the
decree of June 30, 1904, was amended on July 1, 1904, and as
amended provided that if Thomson failed to perform as in the
decree provided within 90 days from that date, to wit: August 1,
1904, he should have no further right or interest in the premises. This
decree of June 30, 1904, then stated that Robert I. Thomson was
not carry out the provisions of the decree of June 30, 1904,
as so amended, but failed to do so and was held in contempt of
the law of \$11,000.00, being the amount due the National Bank
of Ottawa from Thomson upon the note as amended by it.

Bank of Ottawa within 20 days, the sum of \$7514.74, being the amount due on its \$6000.00 note, and directed that a Master's Certificate be issued to it under the first trust deed for said sum and under the second trust deed for \$11, 907.80, being the amount which the decree found due it from Thornton. The decree then found that appellant, Rumsey and Company, claimed some interest in the notes aggregating \$20,500.00 or the moneys collected thereon after the payment of said sum of \$11,907.80, to the said Bank, and granted it leave to file an intervening petition setting up its claim to the moneys represented by said notes, and directed that the Silica Company should pay to the Clerk of the Circuit Court \$16,108.20, within 20 days from the date of the decree, the same to be held by the Clerk to abide the further decree of the Court. The decree then provided that in the event the Silica Company, or any one claiming through it should pay to the said bank said sum of \$7514.74 which is decreed to be in full/ satisfaction of the first trust deed, and should pay to said bank the further sum of \$11,907.80, being the amount found due it as the holder of the notes aggregating \$20,500.00, and should further pay the said sum of \$16,108.20, to the Clerk as above provided: that the then two trust deeds are decreed to be fully paid and discharged, and the real estate therein described is freed and discharged from the liens thereof. The Court, by the decree then expressly retains jurisdiction to determine the rights of appellant.

On October 10, 1928, appellant filed its intervening petition, which, as amended, represented that on February 28, 1919, the Silica Company was indebted to Thornton, and in consideration thereof executed its ten notes aggregating the sum of \$20,500.00, and in order to secure the payment of the same, executed its trust deed upon said seventy-six acres of land: that subsequently Robert I. Thornton became indebted to the First National Bank of Ottawa in the sum of \$8000.00, and placed with said bank as collateral security said notes and trust deed; that on or about April 1, 1921, the said Thornton being indebted to Appellant in the sum of \$2944.78, he made, executed and delivered to appellant his demand note for that sum,

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together with an assignment of said Silica Company notes as collateral security, subject only to the amount due the First National Bank of Ottawa: that on February 1, 1922, appellant notified said bank of said assignment, delivered to said bank the original written instrument in consideration of which the Bank agreed that it would hold said notes aggregating \$20,500.00, first as security for the payment of its loan to Thornton and Second as security for the payment of the amount due appellant from Thornton.

Commonwealth Silica Company, by its answer to the intervening petition, admitted the execution and delivery to Thornton of its promissory notes aggregating \$20,500.00, and the trust deed to secure the payment thereof, admitted the indebtedness of Thornton to the Bank and the delivery of the notes by Thornton to the Bank to be held by the Bank as collateral security for Thornton's indebtedness. The answer neither admits nor denies the indebtedness of Thornton to appellant, but sets up the contract of November 1, 1920, between it and Thornton, and avers that Thornton did not carry out his part of this contract. The answer further alleges that the Silica Company had conveyed the land to Jennie H. Sayler, who paid the amount due under the decree to the First National Bank of Ottawa, and that she deposited the sum of \$16,108.20, with the Clerk, and that it is her money.

The cause was referred to a special Master-in-Chancery who took the testimony and upon a hearing the Chancellor entered an order dismissing the intervening petition of Rumsey and Company for want of equity and from that order Rumsey and Company has perfected this appeal and brings the record to this Court for review.

The evidence discloses that on April 1, 1921, Thornton executed his demand collateral note to Appellant for \$2944.78, bearing 7% interest from date. This note recited that the maker had placed with the payee as collateral security the trust deed on the land in LaSalle County, Illinois. On February 1, 1922, Thornton executed and delivered to appellant a written instrument which acknowledged the receipt by him of \$2944.78, from appellant, and in consideration thereof he assigned to appellant, as security therefor all his interest in the trust deed foreclosed by the decree of June

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25, 1928. This assignment recited, however, that the trust deed at that time was lodged with the First National Bank of Ottawa as security for Thornton's personal loan of \$8000.00, and that this assignment was secondary to that of the bank and that the trust deed should not be taken from the Bank without notice being mailed to appellant. Subsequently and on April 7, 1924, Thornton executed another written instrument in which an indebtedness from him to John H. Holmes in the sum of \$7300.00, and the indebtedness and the assignment to appellant of his interest in the notes and trust deed held by the Bank were referred to. Both of these assignments were delivered to the Bank, and it had full and complete knowledge of the transactions between Thornton and appellant and between Thornton and Holmes. On behalf of appellee the contract between Thornton and the Silica Company, dated November 1, 1920, and the amended decree of June 30, 1924, specifically enforcing that contract are relied upon to defeat the claim of appellant, it being the contention of the Silica Company that Thornton's failure to carry out the provisions of this contract has always been a complete bar to a suit by him to foreclose this ~~suit~~ trust deed, and that he is estopped by the decree of June 30, 1924, which dismissed his bill for foreclosure and decreed a specific performance of this contract from asserting in this proceeding any claim to this fund and that appellant having procured its note and assignment from Thornton long after the execution of the contract of November 1, 1920, took said assignment and now holds it subject to all the equities that could have been urged against Thornton.

The decree of June 30, 1924, was a consent decree and found that on February 28, 1919, the Silica Company purchased of Thornton the land covered by the Trust deeds foreclosed in the instant case: that as a part of the purchase price the Silica Company executed and delivered to Thornton the notes aggregating \$20,500.00, and the trust deed to secure the payment thereof; that subsequently and on November 1, 1920, Thornton and the Silica Company entered into a contract by the terms of which the Silica Company agreed to sell said land, to assign a contract for the purchase of a four acre tract, and to execute and deliver a bill of

sale for some personal property therein described, to Thornton and Thornton agreed to buy said property by obtaining and surrendering to the seller the said notes aggregating \$20,500.00, by assuming the payment of the amount due on the contract for the purchase of the four acre tract, by securing from the First National Bank of Ottawa and surrendering to the Silica Company the notes aggregating \$6000.00, which were secured by the note of that amount which was secured by a first trust deed upon this land, by assuming the payment of \$1100.00, due the American Hoist Derrick Company, and by assuming certain other indebtedness and procuring the surrender of certain other notes. The decree of June 30, 1924, fully set forth this agreement and decreed its specific performance by directing Thornton within twenty days from the date of the decree to do the several things he had bound himself to do, and providing "that simultaneously with the performance by the said Robert I. Thornton of the above and foregoing acts described in the preceeding paragraph of this decree the Commonwealth Silica Company, through its president and secretary shall make, execute, acknowledge and deliver to said Robert I. Thornton its deed of conveyance, conveying by a good and sufficient Warranty Deed Clear and Free of all liens and encumbrances, to the said Robert I. Thornton, the real estate hereinabove in this decree described." The decree then provides that in default of the making of said deed by the Silica Company, the Master-In-Chancery shall do so, and that when said conveyance is so made, the Silica Company shall surrender and deliver possession of all of said land to Thornton.

By the express terms and provisions of this decree for specific performance, the acts of both parties were to be performed simultanedusly. The Commonwealth Silica Company did not tender performance of its part of this decree or ever attempt to carry out any of its provisions, and the rights of the parties thereto were mutually abandoned. There is nothing in this decree which purports to invalidate the notes or trust deed, and it does not follow that because the provisions of this decree were abandoned by the parties that Thornton or his assignee could not enforce the provisions of the trust deed. The testimony of the president of the company

discloses that the company retained this land which it had been decreed to convey to Thornton until shortly after July 1, 1928, when it sold it, received the purchase price and with it the company satisfied the original decree of foreclosure by paying to the First National Bank of Ottawa the amount found due it, and by depositing with the Clerk the sum of \$16,108.20, as in that decree directed. To hold that Thornton or his assignee are precluded either by the terms of the contract of November 1, 1920, or by the provisions of the decree for specific performance from reaching this fund would be to penalize them without showing any damage whatever accruing to the Commonwealth Silica Company. To so hold would be depriving the assignee of Thornton from participating in this fund and would amount to a forfeiture of the rights of appellant therein. A court of equity never favors a forfeiture. Furthermore if Jennie H. Sayler purchased this land and deposited with the Clerk the funds sought to be reached by this proceeding, as set forth in the answer of the Commonwealth Silica Company to this intervening petition, then the Silica Company will not be damaged by the payment therefrom to appellant of the amount justly due it.

We have examined the authorities cited by the parties to this proceeding and in view of the law arising out of the facts in this cause we are of the opinion that the equity of this cause is with the petitioner, Rumsey & Company, the appellant herein.

The decree of the Circuit Court is therefore reversed and the cause is remanded to that Court, with directions to enter a decree in favor of appellant, and for the payment to it from the fund in the hands of the Clerk of the Circuit Court of the amount due upon the note of \$2944.78, dated on or about April 1, 1921, and which was executed by Robert I. Thornton.

Reversed and Remanded with
Directions.

alleged that the company intended this land which is held for
decree to convey to defendant until shortly after July 1, 1932,
when it sold it, received the purchase price and with it the pro-
ceeds of the original decree of foreclosure. It is said that the
first National Bank of Chicago the amount to pay the 10, and by the
company with the bank the sum of \$15,125.00, as is set forth
in the decree. To hold that the bank on this account was benefited
either by the terms of the decree of foreclosure, or by the
provisions of the decree for specific performance from which
this land would be to remain free without showing any damage
whatever so long as the bank remained in the land. To say that
would be to say that the bank of Chicago was benefited in
this land and would amount to a forfeiture of the right of
appellant herein. A court of equity never favors a forfeiture.
Furthermore it is said in the decree that the land was sold
with the bank the proceeds to be received by the bank, and
as set forth in the decree of the first National Bank of Chicago, the
first National Bank of Chicago, and the bank of Chicago will be
benefited by the decree of the first National Bank of Chicago, and
the bank of Chicago.

We have examined the evidence and find that the parties
to take according and in view of the law existing out of the
facts in this case we are of the opinion that the equity in this
case is with the defendant, James & Son, the appellant here-
in.

The decree of the Circuit Court is therefore reversed
and the case is remanded to that court with instructions to enter
a decree in favor of appellant, and for the payment to it of the sum
found in the decree of the Circuit Court of the amount
due upon the note of \$15,125.00, dated on or about April 1, 1931,
and which was executed by Robert I. Thompson.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 19 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

OSCAR HAEBERLE, TRUSTEE

Appellee

-vs-

COMMONWEALTH SILICA CO., et al
(W. M. BUCHANAN, executor of the
last will and testament of JOHN
H. HOLMES, deceased,

Appellant)

Appeal from the Circuit
Court of LaSalle

Jett, P. J.

The questions involved and the rights of the parties in interest in this cause are in substance the same as is in Number 8143, in this court on appeal from LaSalle County, in which an opinion has been filed. The decree in this case is reversed and the cause is remanded to the Circuit Court of LaSalle County with directions to enter a decree in favor of appellant and for the payment to W. M. Buchanan, executor of the last will and testament of John H. Holmes, deceased, from the fund in the hands of the Clerk of the Circuit Court of the amount due upon the note of \$7300.00, dated on or about April 7, 1924, and which was executed by Robert I. Thornton.

Reversed and Remanded
with Directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

83 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 L.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 3 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William F. Beckman,

appellee,

vs.

Appeal from Circuit Court of

Kankakee County.

Brechter H. Alberts, et al

(David Alberts,

appellant)

OCTOBER TERM, 1929.

JETT, P. J.

This is a bill to marshall assets and for relief.

The facts necessary to a proper decision of the case, as disclosed by the pleadings and the proofs, are, briefly, as follows: Brechter and Dave Alberts are brothers. Dave and four others signed Brechter's note as sureties for \$2,500.00. To indemnify them, Brechter gave Dave and the four others his note for \$2,500.00, and to secure the same executed a chattel mortgage of date August 14, 1925, on quite a lot of personal property, including 33 hogs, and his 1925 corn crop. On September 15, 1925, Brechter Alberts gave his note to Beckman, the complainant, for \$3000.00, and to secure it, executed to Beckman a chattel mortgage on his 1925 corn crop, which was already covered by Dave's mortgage. In the meantime, Dave had sold the 33 hogs and had the money for which they sold when Beckman got his mortgage. He paid the hog money to Brechter by six checks aggregating \$912.34, and says he knew that Beckman had a mortgage on the 1925 corn crop when he gave his brother the checks for the hog money. Some time later the Alberts sold the 1925 corn crop for \$1836.06. Dave took this \$1836.06, and, as he himself says, borrowed \$727.24, and paid off the \$2,500.00 note on which he and the others were security, the amount then due on that note, with interest, being \$2563.30.

The note given to Dave and the four others to indemnify them, is in evidence, and on the back of it is this indorsement, and

2000-01-01 00:00:00

Brookfield, N. H. 1949

and none other: "Due on this note \$727.24 - 1/18/27-".

It will be noted this is the exact amount Dave said he borrowed and added to the corn money in order to discharge the note at the bank, on which he and the others were sureties.

On August 6, 1926, Beckman took judgment by confession against Brechter Alberts on his \$3000.00 note, had execution, which was served on Brechter August 7, and was returned October 29, 1926, "Not satisfied." Beckman says it was so returned at the request of Dave and Brechter Alberts, and upon their promise to give him a new note, signed by both of them, for the amount of the judgment. This promise is denied. The note was not given and an alias execution was issued. It was served November 4, and was levied on property in the possession of Brechter Alberts, but covered by the mortgage to Dave and others to secure the note for \$2,500.00 heretofore mentioned.

Dave Alberts gave notice of trial of the rights of property, claiming it by virtue of his mortgage of August 14, 1925, securing the \$2,500.00 note to him and others, on which note was the indorsement: Due on this note \$727.24 1/18/27."

On a trial of the rights of property, he prevailed, and the property covered by the indemnifying mortgage was released to him from the levy.

The order of release was entered March 10, 1927, and the Alberts at once advertised the property for sale. The sale bill recited that the property therein described would be sold March 21, 1927, by virtue of a chattel mortgage given by Brechter H. Alberts to Dave Alberts, mortgagee. A report of this sale shows the net proceeds were \$1557.63, from which was deducted \$736.34, the balance claimed as due on the \$2,500.00 note, being \$727.24, and 7% interest from 1/18/27 to March 22, 1927. The balance he gave to Brechter.

On a hearing, the court found that Dave Alberts should

On a hearing, the court found that Dave Roberts should

be interest from 1/13/37 to March 22, 1937. The balance he gave to
not proceeds were \$1537.35, from which was deducted \$230.35, the
balance claimed as due on the \$3,500.00 note, being \$234.24, and
Albion to Dave Roberts, mortgagee. A report of this sale to the
21, 1937, by virtue of a chattel mortgage given by Webster H.
recited that the property therein described would be sold which
Albion at once advertised in program for sale. The sale bill
The order of release was entered March 10, 1937, and the
him from the levy.
the property covered by the indentured mortgage was released to
On a trial of the rights of property, he prevailed, and
ment: Due on this note \$237.35 1/13/37."
the \$2,500.00 note to him and others, on which note was the mortgage
claiming it by virtue of his mortgage of March 14, 1935, according
Dave Roberts gave notice of trial of the rights of property,
before mentioned.
mortgage to Dave and others to secure the note for \$2,500.00 and
property in the possession of Webster Roberts, and covered by the
execution was issued. It was served January 4, and was levied on
This promise is denied. The note was not given and in return
now note, signed by both of them, for the amount of the judgment.
Dave and Webster Roberts, and upon their promise to give him a
"Not satisfied." Webster says it was so returned as the request of
served on Webster August 7, and was returned October 22, 1935,
Brechter Roberts on his \$2000.00 note, had execution, which was
On August 6, 1935, Webster took judgment by confession against
bank, on which he and two others were guarantors.
and added to the same money in order to discharge the note of the
It will be noted that in the first account there said he had to do
and none other: "Due on this note \$237.35 1/13/37."

account for the hog money, the corn money, and the proceeds of the property sold March 21, 1927, and decreed that he and his brother Brechter should account for and pay to the complainant, within thirty days, the sum of \$1826.23, and costs of suit; from which decree Brechter and Dave Alberts prayed an appeal. The appeal was allowed in these words: "Which said appeal is hereby allowed upon condition that the said defendants file an appeal bond in the penal sum of \$4000.00, etc." Dave Alberts, alone attempted to perfect the appeal by filing bond. Brechter did not join him in the appeal.

It is contended ~~that~~^{by} appellant that complainant had no lien or claim, first, because his chattel mortgage was overdue; second, because his execution became functus officio at the end of 90 days; third, because the rights of the parties were adjudicated in the trial of the rights of property; fourth, that complainant's remedy at law was adequate and complete. He makes the further claim that the complainant procured his note of \$3000.00, by fraud and duress, and has no right to recover because he does not come into court with clean hands. We will first consider this last claim.

Appellant, Dave Alberts, says: "We now come to the most important point in our case based on the maxim 'he who comes into equity must come with clean hands'. Beckman did not come into this court of equity with clean hands."

We cannot concede there is any force in this point. In the first place, as we read the record, the proof does not establish any fraud or duress in the procurement of this \$3000.00 note. In the second place, Brechter Alberts, who gave the note, has not appealed and, so far as the record shows, made no effort in the suit on the note, to impeach it in any way. The point that the complainant had a complete and adequate remedy at law is not well taken. He has no legal remedy at all as against Dave Alberts, and his efforts to enforce his claim through the law court against Brechter Alberts was at all times opposed by Dave. If, therefor, he has any remedy against Dave Alberts he can enforce it only in a court of equity.

account for the money, the coin money, and the proceeds of the property sold thereon \$1, 1937, and showed that as the money was received should account for and pay to the bank, which thirty days, the sum of \$188,000, and order of cash; then the George Frederick and Mrs. Albert, who were on the 1st of January 1938, allowed in these words: "which shall be paid to the bank on condition that the said defendant file an appeal with the court in the sum of \$4000.00, etc." Now Albert, who was supposed to be the appeal by filing bond. However and was found in the appeal. It is contended that appellant had no right to

because his execution became a matter of fact at the end of the third, because the right of the parties were admitted as the trial of the rights of property; namely, that appellant's equity at law was adequate and complete. To make the law clear that the complainant procured the note of \$5000.00, by means and means, and has no right to recover because he has not come into court with clear hands. He will have to come in with clear hands.

Appellant, have Albert, says: "We now come to the most important point in our case based on the record. He was never into equity must come with clear hands. However did not come into this court of equity with clear hands."

We cannot concede there is any force in this point. In the first place, as we read the record, the record does not establish any fraud or breach in the procurement of this \$5000.00 note. In the second place, neither Albert, who gave the note, nor not applied and, so far as the record shows, made no effort to get the note on the note, to impeach it in any way. The point that the complainant had a complete and adequate remedy at law is not well taken. He has no legal remedy at all as against Dave Albert, and his efforts to enforce his claim through the law court against a person Albert was at all times owed by Dave. If, therefore, he has any remedy against Dave Albert he can enforce it only in a court of equity.

The claim that the judgment of the County Court in the trial of the rights of property settled the matter of Dave's liability in this case, cannot prevail. The only ground on which Dave Alberts prevailed in that law suit was that he had a lien on the property levied on for \$727.24, as shown by the indorsements on his \$2,500.00, note, "Due on this note \$727.24 1.18.26." The most that Dave Alberts can claim concerning that judgment is that his right to a lien was established under the forms of law, and if, in this court of equity, it is found his claim had already been discharged or that he secured property more than sufficient to discharge it, he may properly be held to account for all such property, or for the surplus above his lien, as the case may be, but he cannot defeat complainant's equitable action on that ground if complainant's equity had theretofore attached.

Nor do we consider the question whether the mortgage had ceased to be a lien or the execution had become functus officio as being of any importance in the consideration of this case so long as only the original parties are involved and the rights of third parties have not intervened.

As we view this cause the principle upon which it rests is not only ancient and well established, but its application to this case is not involved nor difficult. Mr. Bishpham in his work "Principles of Equity", Section 340, states it as follows: "The doctrine of marshalling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund."

The example he gives in the same section would be this case almost exactly if, instead of two pieces of real estate, he had used parcels of personal property in illustrating.

The same author, in the next section, says the rule in this country is that the marshalling of assets is usually enforced through the equities of subrogation and contribution.

Applying these rules, we find Brechter Alberts, one of

the defendants in the trial court, giving to his brother Dave and others, an indemnifying mortgage on quite a lot of personal property, including his 1925 corn crop and 33 hogs. About a month later Brechter gave complainant a mortgage on the 1925 corn crop to secure him on the \$3000.00, note. In the meantime the hogs are sold, but Dave still has the money. When he learns of the complainant's lien on the 1925 corn, instead of applying the hog money on the \$2,500.00, note he pays it to his brother by six checks, knowing all the time that complainant had a mortgage on part of the same property covered by his mortgage. When he failed to apply the money received for the hogs to the discharge of his own debt he reduced the security just so much. He sold the 1925 corn crop and applied it on the \$2,500.00 note. When he did that the equities between the Alberts and Beckman became fixed.

So far as Brechter Alberts was concerned, he owed Beckman the full amount of his judgment. So far as Dave Alberts was concerned, he was, in equity, bound to apply the hog and corn money to the discharge of his \$2,500.00 note, which would have paid it in full, and permit Beckman to be subrogated to his rights in the rest of the mortgaged property to the extent, at least, of the sale price of the corn, and have the proceeds of such property as was left, applied to the discharge of the Beckman note. Nothing occurred to change the status of the case or the equities of the parties.

Instead of doing what equity clearly required him to do, Dave Alberts handed the hog money to his brother and, when Beckman sought to make his claim out of the rest of the property covered by Dave's mortgage, Dave did what he could to prevent Beckman from realizing any part of his judgment by making the claim that Brechter still owed him \$727.24, which, in equity, he did not, and by handing to Brechter what the balance of the property covered by his mortgage, brought at the sale March 21, 1927, less his pretended claim of \$727.24.

the defendant in the trial court, relating to his brother's share and
others, an indemnifying mortgage on which a 10% interest was paid
including the 1925 corn crop and 25 bushels of wheat. The
defendant gave defendant a mortgage on the 1925 corn crop and wheat
for the \$5000.00, note. In the meantime, the defendant gave the
note still was the money. When he learned of the defendant's plan
the 1925 corn, instead of applying the money to the note, on the 1925
note he paid it to his brother, by his check, and on the 1925
the defendant and a mortgage on the 1925 corn crop and wheat
by his mortgage. When he failed to apply the money to the note, and
the note to the defendant of his own debt he secured the money
just as much. He sold the 1925 corn crop and applied it on the
\$5,500.00 note. When he did that a balance remained of \$1,500.00
and defendant became liable.

As far as defendant is concerned, he owed defendant
the full amount of his judgment. As far as the defendant was con-
cerned, he was, in equity, bound to apply the note and corn money to
the discharge of his \$5,500.00 debt, which would have paid it in
full, and permit defendant to be discharged to his name in the note
of the mortgaged property to the extent of the value of the sale price
of the note, and have the proceeds of such property as was left,
applied to the discharge of the defendant's note. Nothing occurred to
change the status of the note or the application of the proceeds.

Instead of doing what equity clearly required him to do,
he allowed defendant to pay money to his brother and, when defendant
sought to make him return the same, he refused to return it.
By defendant's mortgage, there did not seem to be any reason why
defendant should not be bound to return the same. He was not
still owed him \$5,500.00, which, in equity, he did not, and by paying
to defendant the balance of the note, he was bound by his mortgage,
brought at the sale March 21, 1927, and the defendant's claim of

We find no error in the record justifying a reversal, and the decree of the Circuit Court is affirmed with costs, including the cost of the additional abstract which, we find, was necessary properly to present the case.

Decree Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty _____

Clerk of the Appellate Court

84 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25 LA 632

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 4 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

Gen. No. 8116

Agenda No. 1.

In the Appellate Court of Illinois

Second District

October Term, A.D. 1929

Louis Perucco, Administrator
of the Estate of Mario Sciarini,
deceased,

Plaintiff in error,

Error to Circuit Court of

vs.

La Salle County.

Zefarno Gondolphi,

Defendant in Error.

OPINION by BOGGS, J.

Plaintiff in error, hereafter referred to as plaintiff, brought suit in the Circuit Court of La Salle County against defendant in error, hereafter referred to as defendant, and against one Neil Gondolphi, to recover for the death of plaintiff's intestate. Thereafter said suit was dismissed as to the defendant Neil Gondolphi.

The original declaration, consisting of one count, was filed on January 2, 1925. As abstracted by plaintiff, said declaration charged in substance that, on and prior to July 8, 1924, the defendant was engaged in the flour and meat business at Mark, Illinois; that in selling and delivering such merchandise he owned and operated a certain motor truck; that he had in his employment a son, Neil Gondolphi, aged about 22 years; that on said day the defendant "directed his said son and employee to deliver flour and meat to certain business houses in the Village of Standard, Putnam County, Illinois, and to certain houses in the City of Spring Valley, Illinois, and on said day invited Mario Sciarini, decedent, to go with said driver on said trip and to accompany said driver as a passenger, and that he was also

In the Appellate Court of Illinois

October Term, A.D. 1933

of the State of Illinois,
do hereby certify,

Plaintiff in error,
Versus
Defendant in error.

Defendant in error.

ORDER OF THE COURT

Plaintiff in error, heretofore referred to as plaintiff,
brought suit in the Circuit Court of La Salle County against the
defendant in error, heretofore referred to as defendant, and assigned
one well grounded, to recover for the death of plaintiff's
intestate. The court said suit was dismissed as to the defendant

with costs.

The original declaration, consisting of one count, was
filed on January 3, 1933. As abated by plaintiff, and as
operation changed in accordance with, on and prior to July 2,
1934, the defendant was engaged in the flour and feed business
at York, Illinois; that in selling and delivering such merchandise
he owned and operated a certain motor truck; that he had in his
employment a son, well grounded, aged about 28 years; that on
said day the defendant "directed his said son and employee to
deliver flour and feed to certain business houses in the village
of Standish, Putnam County, Illinois, and to certain houses in
the City of Spring Valley, Illinois, and on said day directed
said son, well grounded, defendant, to go with said driver on said trip
and to return with said driver as a passenger, and that he was also

invited and requested to make said trip by the said Neil Gondolphi; the said Mario Sciarini not being then and there the servant of the defendant, nor the fellow servant of Neil Gondolphi; that while said Mario Sciarini was rightfully and lawfully riding in said automobile truck at the invitation of the said Zefarano Gondolphi and the said Neil Gondolphi, with all due care and caution for his own safety and while the said automobile was being operated by the said employe of Zefarano Gondolphi, the said Neil Gondolphi so negligently and carelessly ran, managed, controlled and operated the said truck, by running it at a reckless, negligent and dangerous rate of speed, to-wit, twenty-five miles per hour, at a point about two miles north of the Village of Standard, where the road was narrow and bumpy, on the road running north and south; that by and through the negligence aforesaid of the said driver the said Mario Sciarini was thrown from said automobile, * * * receiving injuries, etc., and that by reason thereof he died * * * on July 10, 1924," alleging heirship, etc.

Plaintiff's abstract further sets forth that a demurrer filed to said declaration was sustained. Thereafter, on November 18, 1926, by leave of court, plaintiff filed three additional counts. The first additional count charged in substance that the defendant on said July 8, 1924, "was possessed of a certain automobile used by him in his business in delivering merchandise from his store, * * * said automobile being operated by his servant, Neil Gondolphi, in delivering such goods; * * * that on the day aforesaid the defendants invited the plaintiff's intestate, then a youth of tender years, to-wit, 15 years of age, to ride in said automobile from the said Village of Standard to the City of Spring Valley, and requested plaintiff's intestate to assist the said Neil Gondolphi in unloading certain merchandise carried in said automobile to customers of defendant Zefarano Gondolphi at the place of the delivery.

"That on the day aforesaid the plaintiff's intestate, while riding in said automobile truck so driven by the defendant Neil

invited and requested to make said trip by the said Bell Gendolphi
the said Lewis Gendolphi not being then and there the servant of
the defendant, nor the fellow servant of said Gendolphi; that
while said Lewis Gendolphi was negligently and recklessly driving his
said automobile truck at the intersection of the said
Gendolphi and the said Bell Gendolphi, with all due care and
caution for his own safety and while the said automobile was being
operated by the said employee of defendant Gendolphi, the said Bell
Gendolphi so negligently and carelessly ran, managed, controlled
and operated and said truck, by running it at a reckless, negli-
gent and dangerous rate of speed, to-wit, twenty-five miles per
hour, at a point about two miles north of the Village of Standard,
where the road was narrow and busy, on the road running north
and south; that he and through the negligence of the
said driver the said Lewis Gendolphi was thrown from said automo-
bile, * * * receiving injuries, etc., and was by reason thereof
he died * * * on July 10, 1934, * * *
Plaintiff's statement further sets forth that a coroner filed
to said declaration was sustained. Whereafter, on November 10,
1934, by leave of court, Plaintiff filed three additional counts.
The first additional count charged in substance that the defendant
on said July 10, 1934, "was possessed of a certain automobile truck
by him in his business in delivering merchandise from his store,
* * * said automobile being operated by his servant, Bell Gendolphi,
in delivering such goods; * * * that on the day aforesaid he so-
lentants invited the Plaintiff's intestate, then a youth of tender
years, to-wit, 18 years of age, to ride in said automobile from the
said Village of Standard to the City of St. Valley, and requested
Plaintiff's intestate to assist the said Bell Gendolphi in un-
loading certain merchandise carried in said automobile to warehouse
of defendant defendant Gendolphi at the place of the delivery.
"That on the day aforesaid the Plaintiff's intestate, while
riding in said automobile truck so driven by the defendant Gendolphi

Gondolphi, while on the said public highway towards the City of Spring Valley, it was the duty of the defendants to drive said machine at a proper rate of speed and to operate and drive the same with care and caution along said highway, so that the plaintiff's intestate might not be thrown from the machine by reason of the careless and negligent operation of the same.

"That the parents and next of kin of the plaintiff's intestate exercised all due care and caution in permitting plaintiff's intestate to ride with the said defendant Neil Gondolphi and to assist in unloading said goods from the said truck, and in all respects exercised due care in the premises, and that the plaintiff's intestate at all times, while riding in said automobile, was in the exercise of due and ordinary care and caution for his own safety; yet the defendants, as owners of said automobile, and in propelling the same, and in causing the same to be propelled along said highway, violated their said duties and carelessly and negligently drove, managed and propelled the same; that by reason of the carelessness and rapid driving of the same, * * * the plaintiff's intestate was, * * * thrown from said truck" averring injuries resulting in the death of said deceased on July 10th, 1924, etc.

The second additional count is practically the same as the first, except that it charges the defendants with driving the automobile in question in a wanton and willful manner, etc. The third count charges general negligence, as in the first count and avers that said deceased was not a fellow servant with the said Neil Gondolphin in his employment with the defendant at said time.

Demurrers filed to said additional counts were overruled. Thereupon the defendant filed a plea of the general issue and three special pleas, setting forth that the causes of action relied on by the plaintiff had accrued more than one year prior

Gondolingo, while on the said public highway towards the City of Spring Valley, it was the duty of the defendant to drive said machine at a proper rate of speed and to operate and drive the same with care and caution along said highway, as the defendant's intestate might not be known from the machine by reason of the carelessness and negligent operation of the same.

"That the parents and next of kin of the plaintiff's intestate exercised all due care and caution in permitting plaintiff's intestate to ride with the said defendant Wolf Gondolingo, as stated in undated said goods from the said truck, and in all respects exercised due care in the purchase, and that the plaintiff's intestate at all times, while riding in said automobile, was in the exercise of due and ordinary care and caution for his own safety; yet the defendant, as owner of said automobile, and in operating the same, and in causing the same to be propelled along said highway, violated their said duties and carelessly and negligently drove, managed and propelled the same, that by reason of the carelessness and rapid driving of the same, * * * the plaintiff's intestate was, * * * thrown from said truck, resulting in the death of said deceased on July 10th, 1924, etc.

The second additional count is practically the same as the first, except that it charges the defendant with driving the automobile in question in a wanton and willful manner, etc. The third count charges general negligence, as in the first count and avers that said deceased was now a fellow servant with the said Wolf Gondolingo his employment with the defendant at said time.

Defendants filed to said additional counts were overruled. Thereupon the defendant filed a plea of the general issue and three special pleas, setting forth that the cause of action relied on by the plaintiff had accrued more than one year prior

to the filing of said additional counts, and that the same were barred by the Injuries Act. Plaintiff joined issue on the general issue, and demurred to the special pleas. Said demurrers were overruled, and the plaintiff having elected to abide his demurrers, judgment was rendered nil dicit, in bar of action, etc. To reverse said judgment, this writ of error is prosecuted.

A diminution of the record having been suggested, leave was given defendant to file an additional transcript. The original declaration contained certain erasures and pencil interlineations which did not appear in the copy bearing the same file mark. It is the contention of the defendant that these interlineations and erasures were made after the demurrer to the original declaration had been sustained. Plaintiff insists that they were made before said declaration was filed, but concedes that they did not appear in the copy. A motion was made in the trial court to strike such interlineations and to reinstate the words stricken, which motion was allowed. The trial court stated that the declaration submitted to him on the hearing on said demurrer did not contain said interlineations and erasures. This is conceded by plaintiff.

It is first contended by plaintiff that the court erred in sustaining the demurrer to the original declaration. After said demurrer was sustained, plaintiff abandoned his original declaration and filed three additional counts. He is, therefore, not in a position to urge successfully this assignment. *Snell v. Cottingham*, 72 Ill. 161-169; *Bennett v. Union Central Life. Ins. Co.*, 203 Ill. 439-444; *Retail Merchants Ins. Co. v. Cox*, 138 App. 14-21; *Holt v. City of Moline*, 196 App. 235-236.

It is next contended that the court erred in overruling the demurrer to said special pleas. In this connection counsel insist that, even though his original declaration was subject to demurrer, its averments were sufficient to have sustained a verdict in his favor, had one been returned. This contention is based on the declaration with its interlineations and erasures.

to the filing of said additional reports, and that the same were
barred by the injuries to. Plaintiff took on the
issue, and deemed to the special issue. The court was
overruled, and the plaintiff having elected to abide by the
judgment was rendered his rights, in law and equity, are
versus said judgment, this writ of error is presented.

A division of the two no error, have suggested, leave was
given defendant to file an additional transcript. The original

which did not appear in the copy being, the same like result. It
is the contention of the defendant that these instructions and
statements were made after the defendant to the original decision
had been sustained. Plaintiff insists that they were made before
said decision was filed, and contends that although the court
in the copy. A motion was made in the trial court to
information and to rehear the whole case, and

motion was allowed. The trial court stated that the defendant
admitted to him on the hearing on said motion did not concede
said information and statement. This is conceded by plaintiff.

It is first contended by plaintiff that the court erred in
sustaining the defendant on the original decision. It is said
defendant was sustained, plaintiff abandoned his original decision
and filed three additional reports. He is, therefore, not in a

position to urge successfully this assignment. See *Smith v. Smith*,
808 Ill. 433-444; *Retall v. Retall*, 193 App. 236-237.
14-21; *Smith v. City of Moline*, 193 App. 236-237.

It is next contended that the court erred in overruling the
defendant to said special issue. In this contention counsel
insist that, even though the original decision was subject to
error, the court is
dict in his favor, and one been rendered. This contention is
based on the decision with the information and statement.

The only averment of due or ordinary care in the declaration, either as submitted to the court or with the modifications, is that plaintiff's intestate was in the exercise of such care prior to and at the time of the injury. It is, however, contended that this did not render said declaration fatally defective. In support of his contention, plaintiff cites Chicago City Railway Co. v. Cooney, 196 Ill. 466-468, and Illinois Central Railroad Co. v. Warriner, 229 Ill. 91. These authorities give color to plaintiff's contention. However, under the more recent holdings of the supreme court, these contention is not sound. Walters v. City of Ottawa, 240 Ill. 259-265; Hazel v. Hoopeston-Danville Bus Co., 310 Ill. 38-45. In Walters v. City of Ottawa, supra, the court at page 266 says:

"In Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, the general rule is declared to be, that in order to recover for injuries from negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety, and many cases are there cited. The same rule was again announced in Gerke v. Fancher, supra, and Jorgenson v. Johnson Chair Co., 169 Ill. 429. A declaration in an action to recover for injuries received through negligence which does not aver due care on the part of the plaintiff when he was injured, and does not contain any averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred, does not state a cause of action, and, after the period of limitation fixed by the statute has elapsed, cannot be amended to state a cause of action not subject to the bar of the statute. If a declaration omits to allege any substantial fact which is essential to a right of action and which is not implied ~~or~~ in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. Foster v. St. Luke's Hospital, 191 Ill. 94, Bowman v. People, 114 Ill. 474."

In *Hazel v. Hoopston-Danville Bus Co.*, supra, and in *Follette v. Illinois Central Railroad Co.*, 288 Ill. 506-513, the court specifically held that in an action of this character the burden is on the plaintiff to prove that the next of kin was in the exercise of ordinary care.

A declaration which fails to allege a fact, the existence of which is necessary to entitle the plaintiff to recover, does not state a cause of action, and such failure is not cured by verdict. *Hartray v. Chicago Ry. Co.* 290 Ill. 85-86; *Beveridge v. Illinois Fuel Co.*, 283 Ill. 31-33; *Walters v. City of Ottawa*, supra, 264-266.

Neither the original declaration as submitted to the court nor the declaration with the interlineations and erasures, can by the broadest construction be held to have alleged due care on the part of the next of kin of the deceased. Under the foregoing authorities, the original declaration did not state a cause of action.

It is also contended that the second, being the willful and wanton count, did not state a new cause of action. This, like the other additional counts, was filed more than two years after the death of said deceased, and almost two years after the original declaration was filed. As we have held that the original declaration, both as submitted to the trial court and in its form as amended did not state a cause of action, it follows that the court did not err in overruling the demurrer to said pleas.

In view of our holding with reference to the sufficiency of the original declaration, both as considered by the trial court and as amended it is not necessary to discuss the question as to whether the court erred in striking said interlineations, etc., or the other questions arising on the record.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

85 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 I.A. 622²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 4 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A.D. 1930.

Walter J. Conney,

appellee

Appeal from City Court of the
City of Sterling.

vs.

Wood Brothers Thresher
Company, a corporation,
appellant

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant and one Samuel Frank to recover the amount paid on a threshing machine purchased from appellant. The declaration consisted of the common counts, accompanied by an affidavit of merits. A plea of the general issue was filed by appellant and by Frank accompanied by an affidavit of merits. A trial was had, resulting in a verdict and judgment against appellant for \$1150. No verdict was returned against Frank.

The record discloses that on June 9, 1928, appellee signed a written order for the purchase of a separator, the provisions here involved being as follows:

The undersigned hereby order from WOOD BROTHERS THRESHER company, * * the machinery manufactured by them as indicated below, * *

One 26 x 46 steel individual including Wind Stacker, Self Feeder, Weigher with Swinging Conveyor and Wagon Spout.

The purchase price of this machinery is to be \$.
FOB Factory, Des Moines, Iowa, as follows: \$. cash payment
with order; balance as follows, \$9000.00 cash on delivery * * *

In the 'appeal' of 11/11/33

received 11/11/33

Nov. 11, 1933

appeal

Nov. 11, 1933

Nov. 11, 1933

In action in connection with the appeal of 11/11/33

and one appeal of 11/11/33, the appeal of 11/11/33

appeal; the appeal of 11/11/33, the appeal of 11/11/33

of the appeal of 11/11/33, the appeal of 11/11/33

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appeal of 11/11/33, the appeal of 11/11/33, the appeal of 11/11/33

in a letter and the appeal of 11/11/33, the appeal of 11/11/33

was returned to the appeal of 11/11/33

the appeal of 11/11/33, the appeal of 11/11/33, the appeal of 11/11/33

A written order of 11/11/33, the appeal of 11/11/33, the appeal of 11/11/33

here involved in the appeal of 11/11/33

the appeal of 11/11/33, the appeal of 11/11/33, the appeal of 11/11/33

company, the appeal of 11/11/33, the appeal of 11/11/33

below

One 25 x 40 steel building, the appeal of 11/11/33, the appeal of 11/11/33

building, the appeal of 11/11/33, the appeal of 11/11/33

The purchase price of the appeal of 11/11/33, the appeal of 11/11/33

with order; balance of the appeal of 11/11/33, the appeal of 11/11/33

and one 24 x 42 Huber separator. ***

The purchaser hereby waives notice of the acceptance of this order by the Company.

WARRANTY

That the Individual Thresher will thresh all kinds of grains and seeds and operate with less power than any other thresher of the same size and equipment threshing the same quantity and kinds of grain; that the quality of work is unexcelled by any other make of thresher.

That the cylinder will not wrap in any kind of grain wet or dry, when separator is running at proper speed.

All shafting on the Individual Thresher is warranted against breakage for a period of five years.

All cylinder and concave teeth are warranted against breakage for the life of the tooth.

That the Individual Thresher and attachments as above are made of good material, and durable if used with proper care.

If within one year from date of shipment of said machine any parts shall fail by reason of defective material or workmanship the Company will furnish new parts free of charge F O B factory, providing the broken or defective part is delivered, charges prepaid, to the factory of the said Company for inspection.

Belting, sprocket chain and band knives which we do not manufacture, do not therefore come under this warranty. Second-hand machinery and machinery not built by Wood Brothers Thresher Company is not warranted.

AGREEMENT

It is agreed that upon starting the machinery and using the usual care and skill of threshermen, if the purchaser is unable to make the machinery above mentioned operate well, he or they shall within six days from the date of the first use, give written notice to Wood Brothers Thresher Company at Des Moines, Iowa, by registered mail, stating wherein the machine, and in what manner

and one 24 x 48 inch separator.

The purchaser hereby agrees to the conditions of this order by the Company.

WITNESSES

That the Industrial Machinery will operate all kinds of
gaskets and seals and operate with high pressure steam and other
of the same size and equipment including the same gaskets and seals
of steam; that the quality of work is guaranteed by the Company
of this order.

That the quality of work is guaranteed by the Company
and, when necessary, is guaranteed by the Company.

All shading on the Industrial Machinery is guaranteed by the
Company for a period of three years.

All cylinders and components and accessories and other parts
are for the life of the machine.

That the Industrial Machinery and accessories and other parts
are made of good material, and suitable for use in the same.

It is further agreed that the Industrial Machinery and accessories
and parts shall be of the best material and workmanship
the Company will furnish new parts free of charge for a period of
providing the broken or defective part is delivered within the
date, to the factory of the said Company for inspection.

Further, the Industrial Machinery and accessories and other parts
shall be of the best material and workmanship, and the Company
shall be responsible for the quality of the workmanship and the
quality of the material used in the same.

It is agreed that upon delivery of the machinery and parts the
same shall be of the best material and workmanship, and the Company
shall be responsible for the quality of the workmanship and the
quality of the material used in the same.

it fails to fill the warranty.

If after such notice and opportunity to remedy the difficulty, the Company fails to make the machinery fulfil the warranty, the part that fails shall be returned by the purchaser, free of charge, to the place where it was received, and the Company notified at Des Moines, Iowa, whereupon the Company has the option to furnish another machine, or part, in place of the one returned, which will fulfill the warranty, or to return the money or notes, or proportionate part, and that part of this contract rescinded to that extent, and no further claim made on the Company.

The Company will, if necessary, send a service man as soon thereafter as possible and a reasonable time shall be allowed for said service man to reach the machine.

The purchaser hereby agrees to render freely all assistance asked of him. The purchaser further agrees to cover belt pulley on tractor, to prevent belt slippage unless a fibre pulley is used.

It is further agreed that improper pitching of the grain, crowding the machine beyond its capacity, or lack of power shall release the manufacturer from all warranty on the machine.

The continued possession or use of said machinery for six days without said notice shall be conclusive evidence that all warranty has been fulfilled, and the purchaser agrees hereby to release all claims for damages and right to return machine after six days' use and to relinquish any and all right or claim to recoup for any damages or injury in any suit brought to collect the purchase price.

This instrument comprises the entire contract between the parties hereto, and any verbal representations or agreements outside of or contradictory to the foregoing terms and warranty are hereby agreed to be void for all purposes whatsoever.

I or We agree to purchase the INDIVIDUAL Thresher on the above warranty, and no other agreement is to apply."

Across the margin of said instrument is printed: "Salesmen,

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Mechanics and Experts Are Not Authorized to Bind the Company By Any Act or Statement." The purchase price thereof was \$1150, to be paid by a used Huber separator, delivered by appellee to appellant, and \$900 in cash, appellee paying the freight on said separator, which amounted to \$33.50.

The Huber separator was delivered, the cash payment was made and the new separator was received by appellee on July 7, 1928. The testimony on the part of appellee is to the effect that he began using said separator about a month after he received it; that it threshed wheat fairly well, but in threshing oats, it failed to properly separate the same, and some 10 to 20% of the oats passed through into the straw; that when a thresher was working right, not to exceed 2 or 3% of the grain should so pass into the straw. Appellee further testified that he first used the machine on August 7, that it failed to work properly and that he so notified Frank, and an employee of Frank's named Grobe, was sent to look after the machine; Grobe being unable to adjust the same, an expert named Trotter and another named Hutler were sent by appellant to work on said separator, but none of said persons were able to make it work properly.

Grobe and Trotter testified to the effect that the oats being threshed were wet, and for that reason were not being properly separated.

On September 19, 1928, appellee wrote Samuel Frank the following letter:

"You are hereby notified that I have elected to rescind my contract for the purchase of one individual thresher and equipment, manufactured by Wood Brothers Thresher Company, for the reason that it will not do the work for which it was intended, and for which it was purchased, and I hereby offer to return said individual thresher to you at your place of business at Sterling, Illinois, or any other place you may designate within a reasonable distance, as may be directed by you.

"And I demand the return to me of the \$933.50, which I paid you for said threshers, and the return of the Huber separator received by you in part payment for said threshers."

Thereafter, On February 21, 1929, Carl E. Sheldon, attorney for appellee, again wrote appellant, calling its attention to appellee's election to rescind said contract, and demanding return of the consideration paid therefor.

Appellee further testified that he had held himself ready at any and all times to return said separator to appellant, and that he was still ready to return the same, and tendered delivery.

It is first contended by appellant that the evidence on the part of appellee disclosed that he was basing his claim on a breach of warranty, and that that character of suit could not be maintained under the common counts.

This point is not well taken. The record discloses that appellee is suing for the return of the purchase price of said threshers. If he is entitled to rescind the contract, then he can recover the amount paid therefor under a declaration consisting of the common counts. *Baker v. Storey*, 213 Ill. 571-574; *McClintock v. Lake Shore University*, 222 App. 468-473.

Counsel contends that the declaration did not advise appellant of the nature of appellee's claim, and that it was not so advised until the evidence was offered. There is no merit in this contention, as the affidavit of claim fully set forth the ground on which recovery was sought. *Becker v. City of Kankakee*, 213 Ill. 538-546.

It is next contended that the verdict is against the manifest weight of the evidence. In this connection appellant insists that the evidence fails to disclose that said separator was not properly doing its work; and, if it be conceded that it was not properly doing its work, under said purchase order, appellee was foreclosed of his right to rescind by his failure to notify appellant within the time specified in said order. In answer

thereto, appellee insists that the document signed by him, not being signed by appellant, was not a contract, but, even if it be held to be a contract, actual notice was given, appellant accepted said notice, acted thereon, and thereby waived the giving of notice within the time specified. We hold that appellee is right in his contention with reference to such waiver.

In connection with the contention that the evidence was not sufficient, it is only necessary to say that some fifteen to twenty witnesses corroborated appellee's testimony to the effect that said separator was not properly separating the grain. If these witnesses were to be believed, the separator was not properly operating. The credibility of the witnesses was for the jury. We therefore hold the verdict is not against the manifest weight of the evidence.

It is next contended the court erred in its rulings on the evidence. The principal ground of objection to the evidence offered by appellee was that it was not admissible under the declaration, as it tended to show a breach of warranty. In view of what we have already said, this point is not well taken. Other objections were made to the rulings of the court on the evidence, but an examination of the record discloses that no serious error was committed by the court in its rulings thereon.

It is also insisted that the court erred in giving each and every instruction given on behalf of appellee. As to the first, second, third, fourth and fifth of appellee's instructions, the objections urged are in effect the same as appellant has urged against the declaration and against the character of case made by appellee. In view of what we have already said with reference to the law governing an action of this character, it will not be necessary for us to go into a detailed discussion of these instructions. No reversible error was committed by the court in giving said instructions.

Instruction six has to do with the alleged liability of Samuel Frank. Inasmuch as the jury did not find against him, it is not necessary to discuss this objection.

It is insisted that instruction seven is erroneous, for the reason that it allows appellee to recover not only the cash payment of \$900, but also for said Huber separator. This separator was taken in at \$250, and there is no reason why, if appellee was entitled to recover, he should not also be entitled to recover the value of said separator.

Instruction ten states in effect that if appellee gave said separator a fair and reasonable trial and found it was unable to do the work for which it was intended, and that appellee within a reasonable time gave notice of such failure and offered to return said separator, that appellee was entitled to recover. The objection urged to this instruction is that it does not require that notice be given within the time specified in said order. If, as stated, it be held that appellant, by acting on the notice given, waived the time specified in said order, said objections would not be well taken. The record discloses that, until the threshing season opened, appellee had no opportunity to ascertain whether or not said separator would properly do the work for which it was purchased. The mere fact that appellee had paid for said separator would not estop him from rescinding said contract, if otherwise entitled to do so, provided he acted promptly upon ascertaining its failure to do the work for which it was purchased. *Kennett, Sparks & Co. v. Knecht*, 221 App. 601-606; *Conner v. Borland-Grannis Co.*, 294 Ill. 58-62; *Doane v. Dunham*, 79 Ill. 131.

As the evidence tended to prove a waiver of the time specified in said order, it became a question for the jury as to whether or not appellee gave notice within a reasonable time of his election to rescind.

It is next contended that the court erred in refusing to give appellant's first, second and third refused instructions.

Without going into a discussion of the points raised on said instructions, it is only necessary to say that, in view of the law governing the facts in this case, the court did not err in refusing said instructions.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

86 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 I.A. 622³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 4 1936 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District.

May Term, A. D. 1930.

T. E. Burnside, Administrator of
the Estate of Bessie B. Burnside,
deceased,

appellee,

Appeal from Circuit Court

vs.

of Knox County, Illinois.

George K. Slough,

appellant,

OPINION by BOGGS, J.

Between 5:30 and 6 o'clock on the evening of December 11, 1928, Mrs. Burnside, appellee's intestate, was struck by an automobile driven by appellant, on Latimer street, at or near the sidewalk on the west side of ~~Monroe~~^{see} street, in the City of Abingdon. Monroe street in said city is a part of a concrete state highway, and runs north and south. Latimer street is paved with brick, and runs east and west, crossing Monroe street at right angles.

Prior to the time of her death, appellee's intestate resided with her husband, one block north and one block west of said intersection. On the day in question, Mrs. Burnside had been visiting at the home of her sister, who resided about one block south of Latimer street, on the east side of ~~Monroe~~ street. Shortly before the accident, Mrs. Burnside left her sister's home, stating that "she would have to hurry, as she would have to get supper". The next Mrs. Burnside was seen, she had been struck by appellant's automobile and was under the same, her chest or abdomen being under the rear housing, her hair being entangled under the left rear wheel and her feet in front of the right rear wheel of said automobile. There were no eye witnesses to the accident. Appellee's

In the Appellate Court

State of Illinois, 1933.

F. B. Burnside, Administrator of
the Estate of Beatie B. Burnside,

Appellee,
vs.
Appellant from Circuit Court
of Cook County, Illinois.

OPINION BY DOUGLAS, J.

Between 8:30 and 9 o'clock on the evening of December 11,

1932, Mrs. Burnside, appellee's intestate, was driven by an

automobile driven by appellant, on Latham street, at or near

the sidewalk on the west side of Latham street, in the City of

Chicago. Latham street in said city is a part of a concrete

state highway, and runs north and south. Latham street is paved

with brick, and runs east and west, crossing Latham

prior to the time of her death, appellee's intestate resided

with her husband, one block north and one block west of said in-

tersection. On the day in question, Mrs. Burnside had been wait-

ing at the home of her sister, who resided about

on Latham street, on the east side of Latham street.

Before the accident, Mrs. Burnside left her sister's home, stating

that "she would have to hurry, as she would have to get supper."

The next Mrs. Burnside was seen, she had been struck by appellant's

automobile and was under the same, her chest or abdomen being under

the hood, her hair being entangled under the left rear

wheel and her feet in front of the right rear wheel of said auto-

mobile. There were no eye witnesses to the accident. Appellee's

intestate died within an hour after being struck, and left surviving her as her next of kin T. E. Burnside, her husband, and Bernice Hoffman, her daughter and only child. Appellee was appointed administrator of her estate, and instituted this action in the circuit court of Knox county, to recover pecuniary damages for the death of said deceased, alleged to have been caused by the negligence of appellant.

The declaration was in the usual form, to which appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for \$10,000. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that the court erred in giving appellee's instructions 10 and 18, said instructions being as follows:

"The Court instructs the jury that while it is the duty of a pedestrian using a sidewalk crossing in a street in which an automobile is being operated to use reasonable care and caution to avoid injury to himself; yet this duty does not excuse the person driving or operating an automobile from also using reasonable care and caution to avoid injuring such pedestrian. The Court instructs you that such duties and obligations are mutual."

"The Court instructs the jury that it is the duty of a person driving and operating a motor car to use reasonable care and caution to prevent injury to others, and that upon approaching a sidewalk crossing in a street in which such motor car is being driven, it is his duty to make every reasonable effort to see and observe pedestrians who may be using such sidewalk crossing in said street, and that if by the exercise of reasonable care and caution such driver can avoid injuring any pedestrian so using such sidewalk crossing, under the law, it is his duty to do so."

No complaint is made that said instructions are abstract in form, and it is not contended that they do not state correct principles of law. The contention is "that no evidence was

introduced that showed or tended to show that the deceased was using the cross walk at the time this occurrence took place"; that the evidence in the record tends to disclose that appellee's intestate was struck and injured some distance west of the west line of the intersection in question.

There were no eye witnesses to the accident. Several of the witnesses on behalf of appellee testified to the effect that when they came up to the scene of the accident, the rear end of appellant's car was some 20 to 35 feet west of the west line of the sidewalk on the west side of Monroe street, and that appellee's intestate was under the rear of appellant's car, practically in the position above stated. Some three or four of these witnesses further testified in substance that appellant stated that he did not see Mrs. Burnside before she was struck, and that the first he knew that his car had collided with any object was that he felt an impact. This being the state of the record, it was competent to offer proof as to Mrs. Burnside's habits with reference to the exercise of care. Some nine witnesses testified that Mrs. Burnside was a uniformly careful person. Certain of said witnesses testified in effect that she was an unusually careful person when crossing street intersections. Testimony was also admitted without objection, that, in going from her sister's to her home, it was the custom of deceased to cross Monroe street to the sidewalk running north and south on the west side of Monroe street, then north to and across Latimer street to the northwest corner of said intersection. A well-defined path begins there and runs northwesterly across a block of ground owned by Hedding College, and it was Mrs. Burnside's custom, after crossing Latimer street, to proceed to her home along said path. This being the state of the record, we hold that the jury were warranted in finding that appellee's intestate was struck on Latimer street, on the west sidewalk line of Monroe street. The deceased had a broken ankle, numerous scratches on her body, and a fractured skull, all of

introducing that showed or tended to show that the deceased was
during the time when at the time this witness took place;
that the evidence in the record tends to show that the deceased's
intestate was struck and injured some distance west of the
line of the intersection in question.
There were no eye witnesses to the accident. Several of
the witnesses on behalf of Appellee testified to the effect that
when they came up to the scene of the accident, the rear end of the
Appellee's car was some 10 to 15 feet west of the west line of the
sidewalk on the west side of Monroe street, and that Appellee's
intestate was under the rear of Appellee's car, practically in the
position above stated. Some three or four of these witnesses then
then testified in evidence that Appellee stated that he did not
see Mrs. Burridge before she was struck, and that the instant he
knew that his car had collided with any object was that he felt
or tripped. This being the state of the record, it was suggested
to offer proof as to Mrs. Burridge's position which referred to the
evidence of Mrs. Burridge. These witnesses testified that Mrs. Burridge
was a uniformly sane person. Certain of said witnesses testi-
fied to effect that she was an unusually sane person when cross-
ing street intersections. Testimony was also admitted without
objection, that, in going from her station to her home, it was
the custom or deceased to cross Monroe street to the sidewalk
running north and south on the west side of Monroe street, then
north to and across Father Street to the northwest corner on
said intersection. A well-defined path began there and ran
northwesterly across a block of ground owned by William Collins,
to proceed to her home along said path. This being the state of
the record, we hold that the jury were warranted in finding that
Appellee's intestate was struck on Father Street, on the west
sidewalk line of Monroe street. The deceased had a pocket knife,
numerous scratches on her body, and a fractured skull, all of

which the jury would have a right to take into consideration in determining whether or not she was struck by appellant's car with such force that she was thrown or dragged the distance she was found west of said sidewalk line. Appellee was entitled to have the jury instructed on the theory that said accident occurred on the sidewalk line, he having offered evidence supporting that theory. Tyler v. Ullman & Co. v. Western Union Telegraph Co., 60 Ill. 421-434; C. R. & P. Ry. Co. v. Lewis, 109 Ill. 120-134; Missouri Furnace Co. v. Abend, 107 Ill. 44-47.

It is next insisted that the court erred in giving appellee's instruction 17, which is as follows:

"The Court instructs the jury that it is a duty of the driver in operating an automobile, before entering a street occupied by a state highway, to come to a stop, and if you believe from a preponderance of all the evidence ~~xxx~~ in this case that the defendant, George K. Slough, did not come to a stop before entering upon the state highway in Monroe street, then the jury have a right to take such evidence into consideration in arriving at their verdict herein."

It is contended that this instruction did not require the jury to find that the failure to stop at said highway proximately caused said accident and injury. This instruction does not direct a verdict and, while it may not be as carefully guarded as it should have been, there was no substantial error in the giving of the same.

It is next contended the court erred in giving appellee's instruction 16, which is as follows:

"The Court further instructs you that if there was no eye witness to the accident involved in this suit, then it is competent to introduce evidence to show that the deceased, Fessie B. Burnside, was a person of careful habit in using the streets and the sidewalk crossings in such streets to avoid injury by automobiles operated therein; and the jury are instructed that if you believe from a

preponderance of the evidence that the said Bessie B. Burnside was a person habitually careful in such respect, then the jury have a right to take this fact, if proven, into consideration in arriving at their verdict in this case."

The complaint urged against this instruction is that the court should have informed the jury that they had the right to take into consideration the evidence with reference to the careful habits of appellee's intestate in determining whether or not, at the time in question, she was in the exercise of due care, but that it was error to instruct the jury that they "had the right to take this fact, if proven, into consideration in arriving at their verdict in this case." This instruction does not direct a verdict and, while not as carefully guarded as it should have been, no substantial error was committed by the court in giving this instruction.

It is next insisted that "it was error to submit the case to the jury after counsel for appellee had conveyed to them, by the examination of one of the veniremen, the idea that the appellant was insured."

Four jurors had been accepted by both sides. Counsel for appellee was examining the second panel of four, when the following questions were asked and the following answers were made by one of the prospective jurors:

"Q. Mr. Kingery, what is your business? A. Insurance.

"Q. What kind of insurance? A. Automobile and public liability.

"Q. Mr. Kingery, do you know whether or not any insurance company is involved in this case?

"By Counsel for Defendant: I object to the question.

"The Court: Objection sustained."

It is insisted by appellant that the foregoing examination warranted the granting of a new trial by the trial court, and that, such new trial having been refused, that he is here entitled to a reversal of the judgment therefor.

competence of the witness that the said witness is a person lawfully sworn in such capacity, then the jury have a right to take this fact, if proven, into consideration in reaching at their verdict in this case.

The complaint urged against this instruction is that the court should have informed the jury that the right to take into consideration the witness with reference to the facts of the case of appeals is a matter in determining whether or not, at the time in question, she was in the exercise of that it was error to take this fact, if proven, into consideration in this case. This instruction does not mean a verdict and, while not as carefully worded as it should have been, no substantial error was committed by the court in giving this instruction.

It is next stated that the jury after coming to the examination of one of the prospective jurors had seen

applied to examining the second panel of jurors, and the following questions were asked and the following answers were made by the

of the prospective jurors:
"Q. Mr. Ringery, what is your business?
"A. I am a farmer."
"Q. What kind of business? A. Automobile and Radio business."
"Q. Mr. Ringery, do you know whether or not any law is involved in this case?
"A. Yes, I do."
"Q. Counsel for Defendant: I object to the question."
"The Court: Objection sustained."

It is stated by applicant that the foregoing requested the granting of a new trial by the trial court, and that such new trial having been refused, that he is now entitled to a reversal of the judgment therefor.

Counsel for appellant, in the oral argument, stated in effect that the effect of this examination could not be determined until the verdict was returned. When the objection was made to the last question, the court sustained the same, so the ruling was in appellant's favor. It therefore devolved upon him at that time, if he felt that his client was being seriously prejudiced by the examination, to have requested the court to discharge the jurors accepted and to submit the case to another panel. Not having done so, he is not now in a position to complain. A party has no right to speculate on what the verdict may be.

It is also insisted that the court erred in refusing "to permit the defendant to testify to occurrence of facts after parties in interest on behalf of plaintiff had testified as to due care on the part of deceased."

While the testimony of the next of kin with reference to the habits of care of appellee's intestate may have opened to appellant the right to testify in reference to such habits of care, it did not render him competent to testify to the facts and circumstances occurring at the time of the accident. The court did not err in this ruling.

It is also insisted that the verdict of the jury was excessive. The only pecuniary loss suffered by the next of kin was the loss of the services of Mrs. Burnside in appellee's home, and the services she was rendering to her daughter in her home. We hold that the verdict is excessive. While we dislike to reverse a judgment in this character of case on account of the size of the verdict, we feel compelled to do so here, as in our judgment a verdict for more than \$5,000.00 would be excessive.

It is therefore ordered that, if appellee enters a remittitur of \$5,000.00 within twenty days from the filing of this opinion, the judgment will be affirmed for \$5,000.00; otherwise the judgment will be reversed and the cause remanded.

Judgment affirmed with remittitur;
otherwise reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25813.022

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MIKE MANOOGIAN,
Appellee

vs.

I. C. RASMUSSEN, and M. R.
RASMUSSEN, co-partners
doing business as Rasmussen
Brothers,
Appellants,

APPEAL FROM THE CIRCUIT
COURT OF LAKE COUNTY

JONES J:

The plaintiff, Mike Manoogian, recovered a judgment for \$817.50 against the defendants, doing business under the co-partnership name of Rasmussen Brothers, for damages arising out of a breach of contract.

Rasmussen Brothers were engaged in the retail shoe business at 12 North Sheridan Road, in the city of Highland Park. In connection with their business, they operated a shoe repair department which was equipped with stock, fixtures, and appropriate machinery, including one Goodyear stitcher, which did not belong absolutely to them, but was possessed and used under a rental or royalty agreement, whereby the user was required to pay \$5.00 ^a ~~per~~ month.

Manoogian was a shoemaker or repairer at another location in Highland Park. He entered into negotiations with Rasmussen Brothers for the purchase of their shoe-repair business, with the purpose of continuing its operation at the Rasmussen location. Terms were agreed upon and a transfer of the business from Rasmussen Brothers to Manoogian was made. A written agreement evidencing the terms of the sale was entered into on October 1st, 1925. In substance, it ~~recite~~ recited that for and in consideration of the payment of \$1,000 by the plaintiff to the defendants as follows: \$500 cash in hand, and \$500 on April 1, 1926, as evidenced by a note drawing 6% interest, the defendants conveyed to the plaintiff the said business, including good will, material, supplies small tools and equipment. The royalty on the Goodyear stitcher was to be paid by the plaintiff, who should also pay all gas and

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power bills, and a monthly rental of \$50 to the defendants. The agreement further provided that the plaintiff would be permitted to operate the business in the rear of the store "for the duration of the lease" of the defendants. The Rasmussen lease, according to its terms, would terminate May 31, 1929.

Manoogian took possession of the business and moved the stock and fixtures to the rear of the store building. About July 1, 1926, Rasmussen Brothers moved out of the building and Manoogian was compelled to surrender possession of the portion of the building occupied by him as a result of the election of the landlord, Blomdahl, to terminate the lease to Rasmussen Brothers, which expressly provided that they would not under-let the premises or any portion thereof, without the written assent of the lessor. Their act in renting a portion of the building to Manoogian was not with the consent of the lessor and was in violation of the covenant of the lease. Manoogian did not surrender possession until after he received notice from the landlord to vacate and suit had been instituted for possession. He was compelled to place the stock and machinery in storage and finally disposed of them for \$225. He paid \$95 for storage, and \$25 moving expenses, besides other incidental expenses. He then brought this action. A jury was waived by the parties and the cause was tried by the Court who entered a judgment in favor of the plaintiff and against the defendants as above stated for \$317.50.

It is insisted that the Court erred in finding the issues for the plaintiff and also that the judgment is excessive. The oral evidence in the case was confined to the testimony of the parties to the suit and establishes the facts as they have been stated. Under those facts, it cannot be seriously contended that the plaintiff was not entitled to recover. The chief insistence against the judgment is that it is excessive, for it is claimed that there is no data to be found in the record upon which the court could not estimate the actual damages suffered by the plaintiff, and that therefor only nominal damages should have been assessed, unless an allowance be made for expenses of moving and storing the property. No written propositions of law were submitted.

to the Court. Under the circumstances, it must be presumed that if there is any evidence in the record tending to prove actual damages, the Court applied ~~to~~ a proper measure or standard in assessing them.

It goes without saying that the plaintiff suffered considerable actual damage by being forced to remove his property from the store building into a storage house. There is an obvious difference in the value of machinery set up and installed in a suitable place of business and of the same machinery when knocked down and in storage. This difference is not to be considered as an element of "good will". It relates solely to the value of the physical property itself and is to be distinguished from value arising out of a business as a going concern.

There is a wide range in the estimate of the actual value of the property sold to Hancock. The plaintiff testified that it was worth about \$800 while the defendants testified that it was worth from \$3,000 to \$3500. Defendants urge that the judgment includes a large amount on account of damages to good will. But we are convinced from the record that the Court allowed only actual damages to physical property. In ascertaining that damage he did not accept the valuation placed upon the property by the respective parties, but arrived at a conclusion based upon facts in evidence.

One of the defendants, in a conversation with the plaintiff, estimated the actual damages to be \$800. This testimony forms a sufficient basis for the judgment of the court. If the defendant's estimate of the value of the property be accepted as anything like accurate, and if the price finally obtained by the plaintiff for the goods in storage be accepted as proof of its then value, the Court would have been authorized to assess much greater damages than were assessed.

We are convinced that substantial justice has been done in this case and that the judgment should be affirmed.

Judgement affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

887
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice,

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 1.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On

UG 11 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

THE PEOPLE OF THE STATE OF	:	
ILLINOIS,	:	
Deft. in Error,	:	Error to the County Court
vs.	:	
	:	of Rock Island County.
AMANTINE MARTENS,	:	
	:	
Pltf. in Error,	:	

JONES J:

The defendant, Amantine Martens, was convicted in the County Court of Rock Island County under an information containing two counts, one charging an unlawful sale of intoxicating liquor, and the other count charging unlawful possession. The conviction was under the latter count.

There is no conflict in the evidence upon any material point. The record shows that the defendant is a widow, and the mother of a married son twenty-three years old. She is a cook and waitress in a restaurant. Her home was in the second story of a double brick building. Across the hall from her lived Emil Carpenter and his family. Immediately below Carpenter and in the first story of the building was a soft drink parlor which had been owned by Hector Martens, a brother of the defendant. The abstract does not clearly disclose who occupied the first-floor room under the defendant. Hector Martens lived with his sister. On February 3, 1929, he died.

His place of business was closed at the time and remained closed until February 8th. The defendant had a conversation with her brothers and it was agreed among them that she should sell the store, as she called it, and apply the proceeds to the payment of Hector's funeral expenses. Accordingly on February 8th, she took from the trouser's pocket of her deceased brother, some keys and unlocked the front door of the store. She then began cleaning up the place by scrubbing the floor, and washing the tables, chairs, and other fixtures.

She was not able to conclude her work on that day but locked up the place and did not return to it until about 6 o'clock the next afternoon. She again proceeded with soap and water to clean the premises and while she was at work behind the bar, the sheriff and two or three deputies, armed with a "John Doe" search warrant, came into the premises, and one of them jumped over the bar close to where the defendant was at work. She testified that just previous to the entry of the sheriff and his deputies, she had noticed a small bottle with about a teaspoonful of yellow liquid in it which she took to be intoxicating liquor. She had not seen it the day before, because she was not behind the bar on that occasion. She said that when the officers came in, she did not want to "get in bad with it" and picked it up with the intention of throwing it out the back door. Before she could accomplish her purpose, one of the officers seized her and took the bottle from her. The officers say it contained 15 or 20 drops. A search of the premises was made and the officers found under the bar an ordinary whiskey-glass, which contained, according to the defendant's testimony, three or four drops of liquid, and according to the officers' testimony, fifteen or twenty drops. This the sheriff poured into the bottle and caused it to be analyzed. The analysis revealed an alcoholic content of about 42%.

The testimony further shows that the soap, water, cloths and brushes, with which the defendant was working, were plainly visible to the officers when they entered the building; that there was no other person in the premises except the defendant; that she had not had a customer or endeavored to sell anything; that the officers made a diligent search and found no other intoxicating liquor; that the stock of goods consisted of cigars, tobacco, soda water, candy, etc; that the defendant had never been an employee of her brother in his business and had never assisted him in it; that the liquor did not belong to her and that she did not know from whence it came; that there had been no liquor stored in her apartment upstairs; that the liquor found had not come from her home; and that

she had no other purpose or business in the soft drink parlor than to prepare it for sale in order to defray her brother's funeral expenses. There was no proof of any unlawful sale, and the state's attorney entered a nolle as to the count so charging. The jury found the defendant guilty of unlawful possession and the court entered a judgment sentencing her to 90 days' imprisonment in the county jail at such work as might be afforded under the terms of a resolution of the county board of Rock Island County. She was also adjudged to pay the costs.

Various errors concerning the giving and refusing of instructions and the rulings of the court on the admissibility of evidence have been urged, but under our view of the case, it is wholly unnecessary to comment upon them. The uncontradicted evidence in this case fails to fairly establish the defendant's guilt. There is no proper basis for the verdict of the jury or for the judgment of conviction. The state utterly failed to prove that the defendant was in possession of intoxicating liquor as charged in the information. The evidence does not tend to show that the defendant was the owner of the liquor; that she had any previous knowledge of its presence in the store; or that she ever exercised any dominion over it. It is undisputed that her brother was the sole owner of the business prior to his death, and the testimony indicates that the liquor was in the place it was found ever since his death. The record is devoid of any testimony tending to show that the defendant had or claimed to have possession of the liquor. In fact there is no proof in the record that the liquor had ever been unlawfully possessed by anyone. (People v. Peisoz, 226 Ill. App. 363; People v. Ayers, 253 Ill. App. 526.)

The evidence hardly raises a suspicion of guilt and cannot justify a conviction. (People v. Risco, 262 Ill. 593; Marzen v. People, 173 id. 43.) Courts of review are committed to the doctrine that the jury in their deliberations are judges of the facts and the weights of the evidence in all criminal cases, still they will not hesitate to reverse a judgment of conviction in a criminal case, where the evidence on which it is based, is of such an unsatisfactory

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

258
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 I.A. 623¹

BE IT REMEMBERED, that afterwards, to-wit: On

406 15 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

JOSEPH H. FELDERER, administrator
of the ESTATE OF ANDREW WAGNER,
deceased,

Appellant

-vs-

FRANK DIETZ,

Appellee

Appeal from the Circuit
Court of Lake County.

JETT P J:

This suit was instituted in the Circuit Court of Lake County by Joseph H. Felderer, administrator of the estate of Andrew Wagner, deceased, appellant, against Frank Dietz, appellee, to recover damages for the death of Andrew Wagner, resulting from injuries sustained by him by reason of his having been struck by an automobile operated and driven by appellee.

On ^{the} trial of the case before a jury at the close of the evidence on the part of the appellant, the court directed a verdict, and under the instructions of the court the jury returned the following verdict:- "We, the jury, find the defendant not guilty."

Motions for a new trial and in arrest of judgment were made argued and denied. Judgment was rendered on the verdict of the jury and against the appellant for costs of suit and from the action of the court in directing the verdict and the rendering of judgment as aforesaid the appellant has prosecuted this appeal.

The declaration consists of three counts. In the first it is charged that Joseph H. Felderer, administrator of the estate of Andrew Wagner, deceased, complains that Frank Dietz, defendant, was driving a certain automobile along Park Avenue in the village of Livertyville between the village of Libertyville and the village of Mundelein and that Andrew Wagner was walking on the said Park Avenue with due care and diligence at a place thereon customarily used by the public; that the defendant then and there wilfully and wantonly drove and managed the said automobile and by and through

the negligence and improper conduct of the defendant, the said automobile then and there ran upon and struck with great force and violence, the said Andrew Wagner, and that he was thereby then and there killed.

In the second count it is averred that the defendant so driving the automobile as charged in the first count, and that he carelessly and negligently operated ~~in~~ his motor vehicle at a rate of speed greater than was reasonable and proper having regard for the traffic and use of said highway, and as a result of the negligence of the defendant, said motor vehicle struck the said Andrew Wagner while he was using ordinary care and caution in his own behalf and he was then and there killed.

In the third it is averred that the defendant, while so driving the automobile at the place charged in the first count in the declaration, carelessly and negligently failed and neglected to give any and all reasonable warning of the approach of said automobile to the persons walking upon said public highway, and that said automobile, on account of said negligence struck said Andrew Wagner while he was using ~~ord~~inary care in his own behalf and was then and there killed.

It will be observed that in each count of the declaration it is averred that Andrew Wagner, at the time he received the injury that resulted in his death, was in the exercise of due care, diligence and caution.

It is said by the appellant that the declaration charged general negligence, wilful negligence, and that the defendant operated the vehicle at a greater speed than was reasonable and proper having regard for the traffic and use of the road.

We have examined the declaration and each count thereof with the view of ascertaining as to whether or not there was any wilful and wanton count found therein. There is no charge of negligence averred in the declaration other than what is usually known as common law negligence.

The record discloses that on the 8th day of May 1926, Andrew Wagner, plaintiff's intestate, together with John Schonenberger and Emil Rieser, was walking along Park Avenue, situated in

The defendant, in the opinion of the jury, was not a person of ordinary intelligence and was not a person of ordinary education. He was not a person of ordinary intelligence and was not a person of ordinary education.

In the case of the defendant, the jury found that he was not a person of ordinary intelligence and was not a person of ordinary education. He was not a person of ordinary intelligence and was not a person of ordinary education.

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It will be observed that in each case, the defendant was not a person of ordinary intelligence and was not a person of ordinary education. He was not a person of ordinary intelligence and was not a person of ordinary education.

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The jury found that the defendant was not a person of ordinary intelligence and was not a person of ordinary education. He was not a person of ordinary intelligence and was not a person of ordinary education.

The jury found that the defendant was not a person of ordinary intelligence and was not a person of ordinary education. He was not a person of ordinary intelligence and was not a person of ordinary education.

Libertyville, Illinois, which runs in an easterly and westerly direction between the village of Libertyville and the village of Mundelein. The deceased and his two companions, the said John Schoenenberger and Emil Rieser had been in the business section of the village of Libertyville and were traveling on foot to the village of Mundelein where they resided.

It was about eight-thirty (8:30) o'clock in the evening of the said day when they started to walk to Mundelein; they walked on the side walk to the end thereof and then on the highway. The highway on which they were walking was the standard 18 foot pavement with shoulders on each side thereof. Mundelein is situated west of Libertyville and the deceased and his companions were walking west on the north side of the pavement; Rieser was walking about 15 feet in the rear of the deceased, Wagner, and John Schoenenberger. When they had proceeded within a few blocks from the entrance to the seminary in the village of Mundelein, and about one mile west of the main street of Libertyville, they were struck by a car driven by appellee, Frank Dietz. Wagner and Schoenenberger were killed and Rieser was severely injured.

On the trial Rieser testified to having walked along the sidewalk as far as it extended and then on a cinder walk at the north of the pavement; "that at the end of the cinders they went onto the cement road and walked along the north side of the cement road.*** the pavement was dry. *** When we got to the pavement I was about 30 feet behind Wagner and Schoenenberger, who were walking together. I was behind because I stopped to light a cigar. I came closer to them at the time a ford passed us going toward Mundelein. I thought we were going to get a ride so I ran to catch them, but the ford went on, and from then on I walked about 10 or 15 feet behind them until we were struck. I could see them while we were walking, although I couldn't identify them except when the car passed and the lights shined upon them *** I looked back a minute and a half before we were struck and didn't see any cars coming from the east. I heard no warning from any automobile just before we were struck and didn't hear the motor of any automobile coming behind me. I didn't know anything about any automobile coming behind me before I was struck

and I don't remember what happened after I was struck."

On cross-examination he testified, "There was a shoulder all along the north side of the pavement which was about two and one-half or three feet wide **** It was about nine (9:00) o'clock and pretty dark."

This is in substance the only testimony offered on the part of the appellant with reference to how the accident occurred. It will be observed from the testimony of Rieser that the night was so dark that he could not identify his companions who were 10 or 15 feet ahead of him except when cars passed them. It is clear that plaintiff's intestate and Schoenenberger were directly in the path of the west-bound traffic. The evidence shows that Rieser and his two companions were dressed in dark clothes. Rieser says he looked back or to the east a minute and a half before he was struck and at that time he saw no automobiles coming from the east, he did not look ahead and did not look back again and did not know what happened after he was struck.

There is no evidence in this record as to what plaintiff's intestate did or did not do. There is no evidence whether the deceased Wagner at any time looked to the rear or exercised the slightest precaution, notwithstanding he knew automobiles were passing along the highway.

Paragraph 214 (2), Chapter 121 Cahill's ~~Sixty~~ Statute 1925, reads as follows: "It is the duty of any person walking along and upon durable hard surfaced state highways to keep on the left of the paved portion, and when meeting a vehicle to ~~step~~ off of said paved portion to the left."

It will be seen from the testimony offered on the part of the appellant, his intestate, was walking on the right side of said paved highway in violation of the express provisions of the statute.

The evidence shows that the night was dark and according to the testimony of Rieser, while he could see his companions who were 10 to 15 feet ahead of him, he could not have distinguished who they were without lights from the passing cars. Without regard to the alleged negligence of the appellee, we are of the opinion no

and I don't remember what I was wearing."

On cross-examination he testified, "There was a light

all along the north side of the highway. When we left the car
one-half of three feet wide *** I was about nine (9) feet of

and another lamp."

"This is in evidence the only testimony offered in the

part of the complaint with reference to how the witness saw the

It will be observed from the testimony of the witness that the

so both that he could not identify the car as being a 1960

1960 Ford, based on his observation when he was asked to look at the other side

of the car. The witness also testified that the car was a 1960

two or three years old. The witness also testified that the car was a 1960

car or it was a car which had been in the car for a long time

at that time he saw no other cars on the road and he did not

look around and did not look back when he did not see what happened
after he was struck.

There is no testimony in this record as to what of the

first hit state did or did not do. There is no evidence whether the

deceased either at any time looked at the car or observed the

slightest movement, action or reaction of the car or whether he
saw the car at all.

Witnesses: (1) The witness testified

1960, which he believed: "It is very hard to see when driving along

and soon turning hard around state whether he knew or the left of

the road, and when stopped a vehicle to the left of the

never came to the left."

It is also true that the witness testified that the car

of the complaint, his impression, was that it was the right side of

and moved right in front of him of the express witnesses of the

The evidence shows that the witness was not in a position

to the testimony of the witness, while he could see the car when the

were 10 to 15 feet ahead of him, he could not have identified it as a

and he could not have identified it as a 1960 Ford.

The witness testified that he did not see the car when it was

recovery can be had in this case because of the contributory negligence of the plaintiff's intestate.

There is no evidence in the record affirmatively tending to prove due care on the part of appellant's intestate. On the contrary, the evidence discloses an entire lack of due care, and in fact, a violation of the provisions of the statute referred to. It was his duty to have been where the law required him to be if he saw fit to use the pavement as a place on which to walk. His negligence was an efficient and contributing cause of his death. It is plain that if it had not been for his negligence he would not have been in the place of danger and therefore would not have been injured.

We conclude therefore, that in view of the state of the record ~~of~~ the court did not err in directing a verdict for appellee. The judgment of the Circuit Court of Lake County will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 L.A. 628³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 15 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

Lulu Jordan,

appellee,

vs.

Appeal from the Circuit Court of

Winnebago County.

A. H. Nordell,

appellant

May term, 1930.

Jett, P. J.

This suit was brought by Lulu Jordan, appellee, hereinafter called plaintiff, against A. H. Nordell, appellant, hereinafter referred to as defendant, to recover ^{damages} for an injury ~~for damages~~ alleged to have been sustained as the result of a collision between the automobile the defendant was driving and the car in which the plaintiff was riding.

A jury trial was had resulting in a finding in favor of the plaintiff and against the defendant for \$536.30.

A motion for a new trial was made, argued and denied. Judgment was rendered on the verdict of the jury from which the defendant prosecutes this appeal.

The declaration consists of one count in which it is averred that the plaintiff was riding with her husband in an automobile in the City of Rockford, when the defendant's automobile, driven by him on the same street in an opposite direction, made a left turn directly in front of plaintiff and husband, without giving any sign or signal, and the cars came together, from which the plaintiff received the injuries of which she complains.

To the declaration the defendant pleaded the general issue. A number of reasons are assigned for a reversal of the judgment, (1) that the verdict is manifestly against the weight of the evidence; (2) that the court erred in admitting certain evidence offered by the plaintiff; (3) that the court erred in giving certain instructions offered by plaintiff.

The case was argued orally in this court and was confined on the part of the defendant to the second instruction given for the plaintiff, which reads as follows:- "The court instructs the jury, that if they find from the evidence that the defendant was uilty of negligence that caused the injury as alleged in the declaration to the plaintiff, and if you further find upon the evidence that the plaintiff at the time of such injury and immediately prior thereto, was in the exercise of ordinary care for her own safety, then you should return a verdict of guilty against the defendant."

It is the contention of the defendant that the language used in said instruction "as alleged in the declaration," refers to the injury and not to the negligence; and that it was useless to confine the jury to the negligence charged in the declaration when they had never seen it.

We are not unmindful of the fact that the language used in this instruction has been expressly condemned and held to be reversible error. The question arises however, upon this record, as to whether or not the defendant is in a position to urge the question raised on this instruction for the reason that the same error is found in an instruction given at the request of the defendant and is as follows:-

Defendant's instruction No. 1, "The court instructs the jury that the burden of proof is not upon the defendant, A. H. Nordell, to show that he is not guilty of the specific negligence charged in the declaration or in some count thereof, but the burden is upon the plaintiff to prove that the defendant is guilty and this rule as to the burden of proof is binding in law and must govern the jury in deciding the case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict, the jury should adhere strictly to said rule."

It is insisted by the defendant that the alleged error in

his instruction does not counter-act the error in plaintiff's instruction because it does not direct a verdict and does not relate to liability, and relies upon *Bernier v. Illinois Central R. R. Co.*, 296 Ill. 464-472.

We are constrained to follow the rule announced in *Lerette v. Director General*, 306 Ill. 348-354, where it is said:- "It is contended that the court erred in giving certain instructions at the request of appellee, which referred the jury to the declaration to determine the issue. This form of instruction has been repeatedly condemned by this court. (*Krieger v. Aurora, Elgin and Chicago R. R. Co.* 242 Ill. 544; *Laughlin v. Hopkinson*, 292 id. 80.) But appellant is in no position to urge the question in this case, for the reason that the same error is found in many instructions given at the request of the defendant below. *McInturff v. Insurance Company of North America*, 248 Ill. 92; *Fleming v. Elgin, Joliet and Eastern Railway Co.*, 275 id. 486."

It is also urged that the verdict is manifestly against the weight of the evidence. The evidence on the part of the plaintiff shows that she was riding with her husband in an automobile in the City of Rockford when the defendant's automobile driven by him and travelling on the same street and in an opposite direction, made a left turn directly in front of the plaintiff and her husband, without giving any sign or signal and the cars thereby came together.

The evidence further shows on the part of the plaintiff, that the defendant did not slow down or stop before making the turn but on the contrary, made less than a right angle turn when travelling about 15 miles per hour. The defendant gave his ~~version~~ version of the collision and while it is quite different from that given by the plaintiff, it was the province of the jury to determine the question of fact.

The rule is that where the evidence of either side to a controversy standing alone in the record would support a verdict, the

verdict may be accepted as decisive of the controversy. In *Leeper v. Gay, administrator*, 253 Ill. App. 176 at 183, the court said:- "The jury heard the testimony, had the witnesses before them, and while the proofs are conflicting, we cannot say that the verdict is against the manifest weight of the testimony, and appellee is entitled to all the favorable inferences to be drawn therefrom. (*Dick v. Zimmerman*, 105 Ill. App. 615-616; *O'Brien v. Palmer*, 49 Ill. 72 and *Hess v. Rosenthal* 55 Ill. App. 524⁷) Inasmuch as the evidence of either side to the controversy standing alone in the record, would support a verdict, the verdict may be accepted as decisive of the controversy. (*Abrams v. Rideout*, 101 Ill. App. 131; *Watson v. Fagner* 105 Ill. App. 52, affirmed 208 Ill. 136; *Whitsell v. Rising*, 109 Ill. App. 91)."

In view of the rule as we understand it, we are not prepared to say that the verdict is against the manifest weight of the testimony. It is also urged that the court erred in admitting certain evidence offered by the plaintiff. We have examined the record in this respect, and after an examination thereof, we are of the opinion that no reversible error was committed by the trial court in the admission of the evidence of which the appellant complains.

We conclude therefore, that the judgment of the Circuit Court of Winnebago County should be affirmed, which is accordingly done.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

9/7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 I.A. 620⁴

BE IT REMEMBERED, that afterwards, to-wit: On

13th

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

HERBERT LIVINGSTON (AS
ADMINISTRATOR OF THE ESTATE
OF LOUIS N. WENTE, DECEASED)

APPELLEE

VS.

JACOB C. LUTZ,

APPELLANT

APPEAL FROM THE CIRCUIT

COURT OF GRUNDY COUNTY.

MAY TERM 1930

Jett, T. J.

This suit was begun by Louis N. Wente, for an accounting under a contract between himself, and Jacob C. Lutz. Pending the suit and before a decree was entered in said cause, Louis N. Wente, the original complainant departed this life on or about the 2nd day of April 1929, and on the suggestion of the death of the said Louis N. Wente, Herbert M. Livingston was appointed administrator of the estate of the said Louis N. Wente, deceased, and he was substituted complainant in lieu of the said Louis N. Wente, and the suit was prosecuted in the name of Herbert M. Livingston, as administrator of the estate of Louis N. Wente, deceased, complainant, appellee here, and against Jacob C. Lutz, defendant and appellant here.

After issue was joined the cause was referred to the Master-in-Chancery to take the proofs of the matters alleged in the bill of complaint and the said answer thereto and report the same together with his conclusions to the court.

It appears that the cause was originally referred to C. D. Young as Master-in-Chancery and subsequently re-referred to him as special Master, and that he did take the testimony, and while engaged in the preparation of his findings he departed this life. Thereupon the following stipulation was entered into:-

"Whereas, this cause had been previously referred to C.C. Young, first as Master-in-Chancery, and secondly as Special Master-in-Chancery, of this Court to take and return the testimony herein,

together with his findings, and the said C. D. Young did take all said testimony, and both parties had closed their proofs before him, and while engaged in the preparation of his findings herein, based on said proofs, the said C. D. Young suddenly died;

It is stipulated and agreed between the parties by Hilton Schwind and W. K. Bracken, solicitors for complainant, and Rathje and Connor and Clark, munts and Young, solicitors for the defendant, that this cause shall be and here by this is this day submitted to the Honorable Edgar Eldredge, one of the Judges of said Court, for adjudication; that the three separate transcripts of evidence taken in three times before said C. D. Young, and this day filed in the office of the Clerk of said Court shall constitute the evidence herein, shall be the basis of decision, and shall be treated exactly the same as if said evidence had been taken in open Court at this term before the said Judge; that there is no dispute herein as to the correctness of the items of receipt and disbursements contained in the statement thereof prepared by the defendant and submitted to the complainant, and which is in evidence, and there is no dispute as to the personal account contained in said statement and other items of personal indebtedness owed by the complainant to the defendant; that the only dispute as to the figures herein is on the question of interest on the said indebtedness by the complainant; that the questions in issues herein are: (1) was there an account stated: (2) is the statute of Limitations, or laches, a bar; (3) is the complainant entitled to an accounting; and (4) the basis for computing interest if any, on said indebtedness of the complainant; that the accounting sued for herein does not grow out of a lengthy or complicated account, but the account is simple, after proper legal rules have for its determination and stating been laid down; that said accounting is one which the Chancellor himself in open Court has power to determine and state, without going through a reference to the Master-in-Chancery; that if either party should take this cause to a Court of Review then said evidence, as shown by said three transcripts, will be treated as having been taken in open Court at this Term thereof, and such certificate of evidence should be settled as in other cases, and shall consist of said three transcripts and other proper matter.

Dated this 21st day of January, A. D. 1928."

Upon a hearing of the cause a decree was entered in favor of appellee in the sum of \$6557.73, and against the appellant, and it is from this decree that the appellant prosecutes this appeal.

It will be observed that the stipulation contains the following: "that there is no dispute herein as to the correctness of the items of receipt and disbursements contained in the statement thereof, prepared by the defendant and submitted to the complainant and which is in evidence, and there is no dispute as to the personal account contained in said statement and other items of personal indebtedness owed by the complainant to the defendant; that the only dispute as to the figures herein is on the question of interest on the said indebtedness by the complainant; that the questions in issue are:- (1) was there an account stated; (2) is the statute of Limitations or laches a bar; (3) is the complainant entitled to an accounting; and (4) the basis for computing interest, if any, on ~~said~~ said indebtedness of the complainant."

It appears from the record that Louis N. Wente, the original complainant in this cause and his father-in-law, Jacob C. Lutz, Sr., were partners in the stock-raising business in Hickory County Missouri. The partnership had accumulated and owned much real estate and personal property as set forth and described in the bill of complaint. The real estate owned by the partnership was in excess of 1600 acres of land.

Jacob C. Lutz, Sr., departed this life on the 4th of March 1909. Jacob C. Lutz, Jr., his son, was named as one of the executors in the will of his father.

It further appears that by reason of advances made to the capital stock of the co-partnership by Jacob C. Lutz, Sr., Louis N. Wente had become indebted to his partner, Jacob C. Lutz, Jr; that the partners had a meeting on January 8, 1908, at Kansas City where this indebtedness was adjusted by Wente, giving his promissory interest bearing notes to his partner, which aggregated the sum of \$7,216.00.

There was no administration on the partnership assets in

Missouri, but all of the assets of the partnership passed immediately, upon the death of Jacob C. Lutz, Sr., into the hands and control of the appellant, until they were sold and converted into cash by him. On February 3rd 1912, Wente, the surviving partner and the appellant met in Chicago and entered into a written contract, which among other things contains the following:- "Now therefore, be it known that the said parties have this day agreed, that the said Louis W. Wente shall and will execute and deliver to the said Jacob C. Lutz a quit claim deed to all of his interest in the above mentioned premises located in Hickory County, in which he has any interest and the said Jacob C. Lutz, agrees that as soon as said premises have been sold that he will make an accounting to ascertain the exact standing of the said parties, and will act or cause to be paid as such executor of the estate of Jacob C. Lutz, deceased, any money legally coming to the said Louis W. Wente, out of said premises as shown by the said accounting."

The only change made by the contract and the conveyances was in the status of the record title, the appellant having been in the possession and had the management and control of the property since the death of Jacob C. Lutz, Sr.,

Pursuant to the powers granted and the duties assumed by the terms of the contract, the appellant from time to time sold the property in parcels and received the purchase price, and on October 22, 1919, having theretofore conveyed all of the property, received the last of the purchase price, in the sum of \$55,000.00, and at that time his record showed that he had received \$106,208.15 and had expended in and about the management of the estate the sum of \$12,733.75 leaving in his possession as the net realization of the partnership assets provided in the contract to be sold and accounted for, the sum of \$93,474.40.

Notwithstanding the fact the appellant had sold the property and converted it into cash and received the final payments therefore, in October 1919, he failed and neglected to make a settlement with Wente, and to account to him as he had agreed to do by the terms of the contract of February 3, 1912. Owing to the failure of

appellant to comply with the terms of the said contract, this suit was instituted on May 22, 1925.

It is first urged by appellant that appellee's intestate should be charged with interest on the notes that had been executed by Wente to the said Jacob C. Lutz, Sr., up to the time sufficient moneys were received from the sale of the partnership property to discharge the indebtedness evidenced by the notes and interest thereon to the date of such payment.

No other conclusion can be reached, in our opinion, in view of the state of the record, other than that the contract between Wente and the appellant, entered into in February 1912, was a voluntary assignment by Wente to the appellant as trustee to sell the partnership property and close up the affairs of the partnership, and to pay to Wente the balance of his share thereof, if any should appear to be due him upon the final settlement.

The property described in the bill, both real and personal, was partnership property. The property that was dealt with by the terms of the contract in question, was partnership property. The purpose of the contract which operated as an assignment by Wente to appellant was to enable appellant to convert the assets into cash.

The partnership was dissolved by the death of the Senior members thereof. At the dissolution of the partnership by death, neither the surviving partner nor the executor of the deceased partner took title to any of the personal property of the partnership, except as distributees after final liquidation and settlement. Nor does the surviving partner or the heirs or legatees of the deceased partner take title to the real estate of the partnership until such final liquidation and settlement.

In Galbraith vs. Tracey 153 Ill. 34, it is said:- "In equity the real estate of the partnership is regarded as, and stands on the same footing with personal property, no matter in whom the legal title may be vested."

It is also said in Galbraith vs. Tracey, Supra, "In equity the surviving partners are treated as trustees with a fiduciary rela-

should be shared with the estate of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent.

It is the policy of the court to uphold the intent of the testator. The court will not interfere with the testator's intent unless it is manifestly unjust. The court will not interfere with the testator's intent unless it is manifestly unjust.

The court has held that the estate of the decedent is the only entity that can be held liable for the debts of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent.

The court has held that the estate of the decedent is the only entity that can be held liable for the debts of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent.

The court has held that the estate of the decedent is the only entity that can be held liable for the debts of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent.

In *Wheeler v. Wheeler*, 100 N.H. 1, 16 A.2d 1, the court held that the estate of the decedent is the only entity that can be held liable for the debts of the decedent. The estate of the decedent is the only entity that can be held liable for the debts of the decedent.

relationship existing between them and the representatives of the deceased partner of trustee to cestuis que trustent."

The application of this same principle to the appellant, because of the changed relation by means of the contract, is obvious. Wente, the surviving partner as a result of the contract of February 3, 1912, assigned all his right title and interest in the partnership property to the appellant thereby divesting himself of all interest therein, in order that there might be an adjustment of the partnership estate.

Owing to the state of the record, equity requires that the interest should cease on February 3, 1912 when the contract was made. There is nothing to be found in the contract that it was contemplated by either of the parties thereto, that any further interest than that which had accrued, up to and including February 3, 1912, should be collected upon said notes or any of them.

It is insisted by the appellant that Section 16 of the Statute of Limitations bars this suit. The plea in bar of the action is that the five year statute governs because this is a suit to compel an accounting. It is said the right to an accounting accrued October 22, 1919. The two provisions of the statute relied upon respectively by the parties reads as follows, Section 16:- "Actions on unwritten contracts expressed or implied * * * and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action had accrued."

Section 17:- "Actions on written contracts * * * shall be commenced within ten years next after the action had accrued."

The bill filed in this cause is based on the contract entered into between the parties in February 1912. The bill alleges that the appellant is obligated correctly to compute the balance to the credit of Wente and pay it over to him.

The bill seeks to enforce an obligation evidenced by the contract. Appellee proved his claim by the written instrument which is the appellant's express promise, that after selling the property he would correctly compute the balance to the credit of Wente and pay it over to him. Notwithstanding the contract the appellant seeks

the statute that would be applicable if the contract had not been made. Appellant is, or is not, bound by the terms of the contract.

Can it be said that a court of equity will tolerate the appellant, to become the assignee and trustee of the partnership estate under a voluntary assignment thereof from the surviving partner, and agree, as soon as the property of the partnership has been sold, that he will make an accounting to ascertain the exact standing of the respective parties, and will pay, or cause to be paid to Wente, the surviving partner, any moneys legally coming to him, and after he has disposed of the property under the agreement, allow him, to defeat the purposes for which the assignment was made upon the claim that this is a suit for an accounting and that the five year statute of Limitations should be invoked and on the further ground that this is not a suit on the contract of February 1912. The effect of the contention of the appellant is that he acted within the terms of the contract in so far as it gave him a right to convert and make disposition of the property, but when he is called upon to account he then says the suit is not based upon the contract and it is not binding on him. The contention of the appellant that the suit was barred by the statute of Limitation is without merit.

Appellant also insists that this suit is barred by laches. He also contends that if there were no such statute, or if the ten year statute applied; still laches would bar appellee's demand.

The record discloses that every element of the account was shown without the slightest difficulty. It was all contained in the record of the appellant. According to the testimony of the appellant, the figures which he said he exhibited to Wente at the Morrison Hotel in 1920, were those exhibited in Chicago in August, 1924, and those shown on his books at the trial. All of the entries made by himself were as fresh and clear at the trial as the day on which they were made. The record fails to disclose that the rights of the appellant were in any manner affected by reason of any so called laches on the part of the surviving partner Wente.

Equity requires more of a showing than has been made by the appellant before the harsh rule of laches will be invoked.

Moreover, under the facts as disclosed by this record the appellant is not in a position to legally invoke the doctrine of laches.

It is also urged that an account had been stated between appellant and Wentz.

The law applicable to stating accountings either as the foundation of a liability asserted by the plaintiff or as a defense in a suit, is well settled. The importance of an account stated is due to the fact that it operates as an admission of liability from the person against whom the balance appears.

An account stated cannot be made the instrument to create an original liability; it merely determines the amount of the debt where liability previously existed. After an examination of the record, we are of the opinion there was no account stated as contended for by the appellant. We have examined the cross-errors assigned by appellee, especially the cross-error that appellee was entitled to interest from January 9, 1920, to the date of the entry of the decree. We have considered the assignment and are inclined to the opinion that the Chancellor did not err in the respect complained of.

We conclude therefore that the decree entered by the Chancellor should be affirmed, which is accordingly done.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord ~~one~~ thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 EA 8085

BE IT REMEMBERED, that afterwards, to-wit: On

Ser 2 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

MARY RABIDEAU,

APPELLANT

-vs-

LEANDER RABIDEAU and THE
FIRST NATIONAL BANK OF
CLIFTON, ILLINOIS (THE
FIRST NATIONAL BANK OF
CLIFTON)

APPELLEE

APPEAL FROM THE CIRCUIT
COURT OF IROQUOIS COUNTY.

MAY TERM, 1930.

Jett, P. J.

This is an appeal prosecuted by Mary Rabideau, appellant from a decree of the Circuit Court of Iroquois County dismissing her bill of complaint for the want of equity in which she had instituted a proceeding against Leander Rabideau and The First National Bank of Clifton, Illinois.

The record discloses that in 1916, Eugene Rabideau, Sr., deceased, departed this life testate; that his last Will and Testament was admitted to probate in the County Court of Iroquois County, January 8, 1917.

It appears that at the time of the death of the said Eugene Rabideau, Sr., that he was the owner of considerable real estate; that he left surviving him Mary Rabideau, his widow who is the appellant, and six sons; that at the time of his death his estate was somewhat involved in indebtedness.

This cause involves the construction of the second and seventh clauses of the Will of the said Eugene Rabideau, Sr., deceased, to determine whether certain payments required to be made by a devisee are charges on certain lands devised by the testator. The second clause of the testator's Will is as follows:- "I will devise and bequeath to my beloved wife, Mary Rabideau, the use of all of my proper real, personal and mixed, until her death, with this provision, that she shall be entitled to one-half the income from all this proper

but shall apply the other one-half of the income to paying off any existing indebtedness, until all such existing indebtedness is paid off. Until such existing indebtedness is paid, she shall have the right to rent all my property to whomsoever she may want to rent it, but after such indebtedness is fully paid, she must rent the land to each one of my six sons and they shall pay her the sum of \$4.00 per acre annually. My intention is that each son shall have the eighty acres which I am devising him in this will, subject to the annual rental hereinbefore mentioned."

The seventh clause of the Will of said testator is as follows:-

"To my beloved son Leander Rabideau, I give devise and bequeath the South part of the West fractional part of the Southeast quarter of Section 3, Town 28, Range 13 West, consisting of about 46 acres, also the North half of the Northeast quarter of Section 10, West of the Iroquois River, Town 28, North Range 13 West, all in Iroquois County, Illinois, but within two years after the death of both myself and my wife, he shall pay to my beloved daughter Rose Emma Rider, the sum of \$250.00, and subject to the life interest in favor of my wife as indicated before."

It appears that the widow finally paid off all of the debts left by the testator. The children went into the possession of the respective parcels of land devised to them by the testator.

The record shows that the son, Leander paid his mother, the appellant here, \$4.00, per acre for one year and then ceased to make further payments. He became indebted to various persons and gave trust deeds to secure his indebtedness. The trust deeds were foreclosed without making the appellant a party to the suit; his land was sold and after the period of redemption had expired a deed was made to the First National Bank of Clifton, The said First National Bank of Clifton is now in possession through a tenant, and neither it nor Leander are making any annual payments to the appellant.

The \$4.00, per acre required to be paid to the appellant by Leander, as provided in the will, not having been paid, appellant filed her bill setting up the delinquency and that the land had be

devised to Leander subject to the amount required to be paid to appellant and claiming that she had a lien on the said real estate as security for the payment of the amount given her by the testator, and in her bill prayed that the court would ascertain the amount due her, order same paid to her by a short day and upon default of such payment, that the premises be sold, to pay the amount due her under the Will.

Appellee, First National Bank of Clifton, together with Leander Rabideau, were made parties defendant to appellant's bill.

Leander Rabideau defaulted, and the bank filed an answer. A hearing was had with the result as aforesaid.

This cause was argued orally in this court. On the oral argument counsel for appellee admitted that the bank had no right to the present possession of the premises and that it was probably liable to the widow for the use and occupation. This admission was made however, upon the theory that the widow has a life estate in the real estate involved.

If a life estate was involved, this case would have no place in this court. The said appellee contends that the provision providing for the payment of \$4.00, an acre per year is not a charge against the land.

Appellee further insists that under the terms of the Will, the widow must look to her son for payment. If the contention of appellee bank be true, then the effect of it would be to defeat the widow from receiving the benefits which arise from the plain provisions of the Will of her husband, the testator.

It will be seen that by the second clause of the Will, the testator devised to his wife the use of all of his property both real and personal until her death, but this devise was made subject to the provision, that she^{shall} be entitled to one-half of the income from the property and shall apply the other one-half to the payment of existing indebtedness, until it had been fully paid off.

The said clause further provides, that until such indebtedness is paid, she shall have the right to rent the property to whomsoever she desires, but when the indebtedness has been paid she must rent the lands to each of the said six sons and they shall pay her

the sum of \$4.00 per acre annually.

It will be observed that the testator, in express language, declared his intention, that the real estate to be taken by his said sons, when his debts are paid off, shall be the real estate which he devises to them in subsequent clauses of the Will and he makes the devise to them "subject to the annual rental hereinbefore mentioned."

It will be seen that a condition is attached to his bequest made in clause seven which requires his son, Leander, within two years after the death of the testator and his wife, to pay to the testator's daughter, Rose Emma Rider, the sum of \$250.00, and is made "subject to the life interest in favor of my wife as indicated before."

The general plan and scheme that the testator had in mind is quite apparent. He manifested a desire to conserve his property. He desired to provide a source of maintenance and support of his widow. To that end he imposed the task to his wife alone of looking after the payment of his indebtedness during the period which would be required to accomplish that end. He gave her the exclusive use, control and management of his real estate. His children had no present right of possession. If his indebtedness had been to such an extent that it could not have been paid in the life time of his children, they would never have received any of the benefits of the devises made to them. The estate which she had during the period required to pay off his debts in an estate for years, possessing all of the essential requirements of such an estate.

Although the second clause of the Will denotes the payment to be rent, it is evident from the context of the Will that the relation of landlord and tenant was not to exist between the widow and her children after the payment of the debts of the testator.

The testator selected the particular tract of land which he gave to each of his sons. He bestowed no discretion upon the widow. They, the sons, had the right of entry without her consent. The widow could impose no terms upon them. She had no estate in their lands. All the right that she had after the debts were paid was to receive annual payment of \$4100, per acre. In no sense can she be described as a life tenant. There was no devise to her which she could convey. She owned no interest in the land which could be

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levied upon under execution and she could not acquire a homestead in any tract of land devised to her sons. As already been seen from the language used in the second clause of the Will, that it expressly made the devises to each of his children "subject to the annual rental hereinbefore mentioned." The only annual rental hereinbefore mentioned was the said payment of ~~\$40~~ 4.00 per acre annually to the widow. In order to make assurance doubly certain, the testator provided in the seventh clause of his Will, which clause contains, as we have already seen, the devise to his son Leander of the property involved in this suit and reiterated in his Will that the devise is made subject to life interest in favor of his wife. It is apparent from the language of the Will, that the life interest comprehended nothing except the payment of \$4.00 an acre per year to the widow.

It is argued by appellee that the seventh clause of the Will referred to the widows bequest as a life estate. It only requires a reading of the said seventh clause to convince one that it does not refer to the widow's bequest as a life estate, but it calls it a life interest and it means the interest she has by which she is to receive \$4.00, an acre annually during her life.

In view of the provisions of the Will, we are of the opinion that the language employed makes the payment of \$4.00, an acre a charge upon the land, and that the appellant has a right to enforce that charge by a sale of the land if it becomes necessary.

We are of the opinion that the equities of this ~~clause~~ are with the appellant; that she is entitled to a decree declaring the bequest made to her to be a charge against the land.

We are of the opinion however, that it would be inequitable to permit the appellant to accumulate the payments over a long term of years and then seek to enforce her ^{line} ~~line~~. Irwin vs. Wollpert, et. al. 128 Ill. 527.

We conclude therefore, that the payments which became due and were not paid within five years immediately preceding the institution of this suit should be held to have been forfeited by reason of laches.

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any trust of land devised to her sons...
has been made in the case of the will...
which was devised to each of the children...
and furnished no... the only...
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The decree of the Circuit Court of Iroquois County is reversed and the cause remanded with directions to enter a decree in conformity with the views herein expressed.

Reversed and Remanded with Directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

73 AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk. 2531A 0341

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP - 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

JOHN K. RYSKIEWICZ,

APPELLEE

VS

WILLIAM H. DEASON, et al.
(North Shore Real Estate
Improvement Corporation),

APPELLANT

APPEAL FROM AN INTERLOCUTORY ORDER
ENTERED IN THE CIRCUIT COURT OF
LAKE COUNTY APPOINTING A RECEIVER.

MAY TERM, 1930.

Jett, P. J.

This is an appeal from an interlocutory order entered on the 6th day of February 1930, in the suit of John K. Ryskiewicz, appellee, against William H. Deason et al. (North Shore Real Estate Improvement Corporation, appellant) appointing one Earl K. Cook, receiver of certain real estate mentioned and described in the bill of complaint situated in the County of Lake in the State of Illinois.

The order provides, that the receiver should be appointed upon the complainant entering into a bond in the sum of \$500.00, and the receiver a bond of \$3000.00.

It is urged by the North Shore Real Estate Improvement Association, appellant, that the order appointing the receiver is erroneous for the reason that the court ordered a receiver appointed upon the complainant (appellee) filing a bond in the sum of \$500.00, without any time being specified in which said bond was to be filed; also that the time for the filing of a bond by the receiver was not fixed.

It is also urged that the court was not authorized under the showing made, to appoint a receiver.

The record discloses, that on the 28th day of October 1929, John K. Ryskiewicz, appellee, filed his bill in the Circuit Court of Lake County seeking to foreclose a Mechanic's Lien against certain real estate in the City of North Chicago.

It is alleged in the bill that appellee has been engaged in business in the City of North Chicago for ten years, selling coal, cement, gravel, torpedo and sundry building material; that on the 22nd day of March 1929, William W. Deason, Karl R. Ahl and John Bengea, co-partners doing business as the Madison Construction Company and being the duly authorized agents and general contractors and having charge of the improvements and buildings being constructed and to be constructed on the premises (in said bill described) and acting for, and on behalf of, and having been authorized to construct the buildings and purchase materials therefor by William James Larkin, Jr., and North Shore Real Estate Improvement Corporation, a corporation, and with their knowledge and consent, applied to appellee to furnish various kinds of building materials for the purpose of at once making certain improvements upon the premises described in the bill of complaint.

It is alleged that William James Larkin Jr., owned a part of the lots and the appellant owned a part of the lots on which the improvements were constructed in fee.

The bill further alleges, that on March 22, 1929, appellee entered into a verbal contract with Deason, Ahl, and Bengea, co-partners doing business as Madison Construction Company, the duly authorized agents and general contractors in charge of the improvements and buildings being constructed and to be constructed on said premises to furnish various kinds of building materials to be used in, and about, the construction of a large number of buildings and that the Madison Construction Company agreed to pay for such materials at the market price of said material on delivery.

It is also alleged in said bill that pursuant to said contract, appellee furnished the materials used in the construction of said buildings in question and at the price agreed upon; that the Madison Construction Company failed to pay to appellee the sums justly due for the materials furnished and delivered; and that there is due appellee the sum of \$1974.71, together with interest; that all the materials were actually furnished under said contract and

used in the buildings and that the prices charged for each article or item was the market price in the city of North Chicago on the respective date of their delivery and all of the materials went into the buildings and constituted a permanent improvement; that notices were served upon William James Larkin, Jr., and North Shore Real Estate Improvement Corporation, claiming a lien upon the premises described in the bill of complaint.

It is urged that since the bill was not verified the order appointing the receiver should be vacated and set aside.

The record discloses, that a petition was filed by appellee setting forth fully, the grounds on which the prayer for a receiver was based. The petition filed by appellee for the appointment of a receiver was sworn to. The order of the Chancellor appointing the receiver was sworn to. The order of the Chancellor appointing the receiver recites that, the cause came on to be heard upon the petition of John K. Ryskiewicz, who is the appellee in this proceeding, for the appointment of a receiver for the property described in the bill of complaint, and it appearing to the court from the petition, and from the evidence procured in open court, and the court having considered the petition and the evidence finds that the allegations of the petition are true. There is no certificate of evidence presented so that the appellant is not in a position to complain that the chancellor did not have before him sufficient evidence on which to base its findings of fact on which the order for appointment of the receiver was entered.

We are of the opinion therefore, that the fact that the bill was not sworn to, is not well taken in view of the record in this cause.

It is insisted that, as the order appointing a receiver did not fix the time in which the bonds to be given by appellee and the receiver should be filed, the order should be vacated. An order appointing a receiver should fix the time in which the bond of the complainant, if the complainant be required to give a bond, and the bond of the receiver, should be filed.

In this case however, the order appointing the receiver on February 6, 1930, contains the following:- "Bond of receiver fixed

at Three Thousand (\$3000.00) Dollars, with Charles Ludlow as surety. Bond of complainant fixed at Five Hundred (\$500.00) dollars, with Steve Cackovic as surety."

The record shows that five days thereafter, appellee and receiver filed their bonds with the respective sureties as directed in the order. No claim is made that the receiver took possession of any of the property before the filing of the bonds. The order appointing the receiver would not become effective until the bonds were filed by appellee and the receiver.

In view of the fact that the order appointing the receiver fixing the amount of the bonds and approving the surety and the bonds were filed five days thereafter; and in view of the further fact that no claim is made that any steps were taken by the receiver before the order was complied with and that the appellant has not in any way been deprived of any right or suffered any damages thereby, we are not prepared to say that the order appointing the receiver should be vacated because no definite time was fixed in which to file the bonds.

It is urged by the appellant that before the appointment of a receiver proof should be made of the inadequacy of the security and that the person liable for the debt is insolvent and unless both of these conditions exist, no sufficient cause is shown for the appointment of a receiver.

In the petition filed for the appointment of a receiver, it is charged that the defendants have allowed the premises in question to depreciate and fall into a state of disrepair; that some of the buildings are exposed to the elements of rain and snow; that the premises which are almost completed, are falling into a state of ruin which is injuring the security of appellee; that said premises are scant security for the payment of the sum due to the petitioner.

It is further alleged in said petition that the taxes and assessments for the year 1928, on all of said premises have not been paid, and the petitioner is informed and believes, and so states the facts to be, that the greater portion of said premises are not covered

at Three Thousand (\$3000.00) Dollars, with \$1000.00
Bond of complaint fixed on Five Thousand (\$5000.00) Dollars, with
Steve Jackson as surety.

in the order. No claim is made that the receiver took possession
of any of the property before the filing of the order. The order
appointing the receiver would not become effective until the bond
were filed by appellee and the receiver.

In view of the fact that the order appointing the receiver
fixing the amount of the bond and appointing the receiver and the
bonds were filed five days thereafter; and in view of the fact
that no claim is made that any person came into the receiver's
possession before the order was executed with and that the receiver has not
in any way been deprived of any right or interest in the property
by, we are not prepared to say that the order appointing the receiver
should be vacated because no definite time was fixed in which to file
the bonds.

It is urged by the appellant that before the execution of
of a receiver order should be made of the liability of the receiver
and that the person liable for the debt is insolvent and a loss will
of these conditions exist, no sufficient cause is shown for the
appointment of a receiver.

In the petition filed for the appointment of a receiver,
it is charged that the defendants have alienated the premises in
question to defendant and will thus a state of insolvency; that
some of the buildings are exposed to the elements of fire and ruin;
that the premises which are almost a ruin, are dilapidated, in a
state of ruin which is injuring the security of the premises and
premises are being mortgaged for the purpose of the sale of the

It is further alleged in said petition that the defendants have
assessments for the year 1938, on all of said premises have not been
paid, and the petitioner is informed and believes, and he states the
facts to be, that the greater portion of said premises are not covered

by insurance and that in case of fire or tornado the security of the petitioner and intervening petitioners will be completely wiped out.

The chancellor in his findings, found ~~that~~ after considering the petition and the evidence that the allegations of the petition were true; and that the incompleeted buildings have not been protected from weather and the elements; ~~xx~~ that there are unleased mortgages against said premises; that certain lien claimants have intervened in the original cause filed by appellee and claim to have liens upon the premises in controversy; that certain claimants have filed claims for liens with the Clerk of the Circuit Court of Lake County, that have not intervened in this cause; that said premises have been levied upon by the sheriff of Lake county by virtue of a judgment entered in the Circuit Court in said County.

We are of the opinion that a sufficient showing was made to authorize the appointment of a receiver. We do not understand the rule to be that in a case as is presented in this record, that before a receiver may be appointed it must be shown that the person liable is insolvent, and especially where the record discloses as herein, that the property on which the lien is based is allowed to depreciate in value and to become less valuable for lack of proper attention, together with a failure to pay taxes.

It is further claimed by the appellant that the bill of complaint shows that there were separate contracts on each of the buildings involved and that they were not adjacent or adjoining to each other, and that separate suits should have been prosecuted. Irrespective of whether this is true or not, the appellant is not in a position to raise that point in this proceeding.

The only question before this court on review is whether or not the court properly or improperly appointed a receiver. As to the sufficiency of the bill of complaint in other respects and whether the bill complies with the statute, we do not think can be questioned at this time and in the manner in which it is sought to be done.

by insurance and loss in case of fire or damage the security of the position and insurance policy will be secured.

It is suggested in this instance, that the security of the position of the receiver should be secured by the insurance policy. The receiver should be insured against the loss of the position of the receiver. The receiver should be insured against the loss of the position of the receiver. The receiver should be insured against the loss of the position of the receiver.

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It is suggested in this instance, that the security of the position of the receiver should be secured by the insurance policy. The receiver should be insured against the loss of the position of the receiver. The receiver should be insured against the loss of the position of the receiver. The receiver should be insured against the loss of the position of the receiver.

It has already been seen that the bill of complaint alleges that on March 22, 1929, a verbal contract was entered into between appellee and certain defendants doing business as Madison Construction Company, the duly authorized agents and the general contractors in charge of the improvements and buildings constructed on the premises in question, to furnish certain and various kinds of building material.

It appears from the bill of complaint that the Madison Construction Company were the general contractors for all of the improvements involved in this proceeding. There was but one contract entered into, and that was for the material for all of the buildings. The bill of complaint does not allege nor does it appear that these lots in question were not adjacent or that the buildings were not adjoining buildings.

In view of the allegations of the bill of complaint, we are of the opinion that the contention of the appellant that separate bills should have been filed against each building to foreclose the lien, is not well taken.

In view of the state of the record, we are of the opinion that the chancellor did not commit any reversible error in the appointment of a receiver and that the order of the Circuit Court of Lake County should be affirmed, which is accordingly done.

Order affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I herunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

94 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 834

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 2 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HARRY DEE, Administrator of the
Estate of JOSEPH G. DEE, deceased,)

Appellee)

-vs-)

THE CITY OF PERU, ILLINOIS, a
Corporation,)

Appellant)

APPEAL FROM THE CIRCUIT

COURT OF LA SALLE COUNTY.

MAY TERM, 1930.

JETT, P. J.

This is an appeal by the City of Peru, appellant, from a judgment entered in the Circuit Court of La Salle County, against it, in favor of Harry Dee, administrator of the estate of Joseph G. Dee, deceased, appellee, for the sum of \$750.00.

For the purposes of this opinion, appellee will be referred to as plaintiff, and appellant as defendant.

The declaration consists of five counts. The first avers that on June 21, 1927, the defendant, the City of Peru, was possessed of, using, and in control of, a public street known as Putnam street, in said City, which constituted a part of the public highway extending to and across the Illinois river; over and across which Illinois River, as a part of said street or highway, the City of Peru constructed and maintains a bridge, which contains a drawing span, so constructed that the same might be moved or turned in such manner as to make an opening in the passage-way across the said bridge to permit the passage of boats up and down the Illinois river; that it was the duty of the defendant, while it so possessed and had control of said bridge, to keep the same in good and safe repair and condition for passage of persons and vehicles over the same, yet it wrongfully and negligently permitted said span to remain open in such manner as to make an opening in the passage-way through which an automobile or other vehicles passed along said bridge must necessarily fall into the river; by means whereof the

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Plaintiff's intestate, while in the exercise of ordinary care necessarily and unavoidably fell through said opening and into the river and was killed. The first count of the declaration was amended by striking out the words "constructed and", the charge remaining that the city possessed, used and controlled the said street and that the bridge was on the road leading to the city and connected with said Putnam street.

The second count is the same as the first as amended, except to charge that the city permitted the bridge to remain swung or open to let boats through without any sufficient guard or warning being placed or maintained at the approach thereof, to warn persons that the span of said bridge was open; by means whereof the plaintiff's intestate while in the exercise of ordinary care while riding in an automobile unavoidably fell through the opening and was then and there killed.

The third count avers that the City negligently and wrongfully suffered said span in said bridge to remain open without any sufficient guards, gate or barrier across the same.

The fourth avers a duty to place a warning by gates or barriers or other obstacles in the approach to said bridge warning persons that the same was unsafe to cross and avers a breach of said duty in that when the bridge was swung and the span open, it was permitted to remain open without any sufficient guard, gate, or barrier, or other warning being placed at a sufficient distance from the opening or roadway to warn persons that said span was open and giving them an opportunity to stop before reaching said opening.

The fifth avers that the gates or barriers placed across said opening while the bridge was swung were defective and insufficient distance from the opening to permit a person driving an automobile to stop after seeing the gates before reaching the passage or opening in the bridge.

To the declaration as amended the defendant pleaded the general issue, and special pleas denying the possession, use and control of said bridge and denying that it maintained it.

A number of reasons are assigned by the defendant for

a reversal of the judgment. The City of Peru is located north of the Illinois River. The river runs east and west at Peru, and the bridge in question extends substantially north and south.

It appears that on the day in question, about the hour of 7:30 o'clock in the morning, the plaintiff's intestate, in company with George Schuetz, who was driving the automobile, who had been engaged in delivering meat products, drove through Peru and onto the bridge in question.

Because of some defect in the mechanical operation of the draw, the bridge was closed and the draw was opened to permit of repairs. On the Peru side of the bridge was a gate which had been installed, so that it was closed whenever the draw was open. On the day in question when the repairs were being made the draw was opened and the gate was closed.

It is the contention of the plaintiff that his intestate and the driver of the car did not have any notice or warning of the bridge being open; that the gate was weather beaten and otherwise obscure so that it was not seen by the driver or the deceased until the car was within fifty feet of it and too late to stop before the car crushed the gate and then precipitated into the river where plaintiff's intestate was drowned.

It is the contention of the defendant that the bridge in question is not owned or controlled by the city of Peru; that if any negligence could be attributed to the city of Peru on account of the defect in the bridge, it would be because of the failure of the city to close the road entirely from public travel.

This contention of the defendant is based on an ordinance adopted by the City Council of the City of Peru, July 5, 1890, attempting to change its boundaries from those contained in the original act of incorporation.

The record discloses that the city of Peru was incorporated March 15, 1851, and that its corporate boundaries extended to the south side of the Illinois river; that on March 13, 1890, the city council submitted to the voters of that city the proposition of being becoming incorporated under the general incorporation act.

On March 15, 1890, the city Council canvassed the vote and declared the result and took the necessary steps to perfect the organization under the general incorporation act in relation to cities and villages.

The evidence further shows that on July 5, 1890, the city council of the city of Peru undertook to pass an ordinance changing the boundaries of the city and fixing the south boundary line of the municipality at the north line of the Illinois River. The ordinance of July 5, 1890, was admitted in evidence over the objections of the plaintiff. No authority is conferred upon the city council to change the boundaries of a city. The rule is that a municipality can exercise such powers and only such power as are expressly delegated to it or are necessarily or fairly implied as an incident to powers expressly granted. A city undertaking or attempting to pass an ordinance of that character must be found in its character in express terms or it must be necessary to carry out some of the powers expressly granted. The city of Chicago vs. Webster 246 Ill. 304-307.

When the city of Peru adopted the general incorporation act, no change was made in the legal identity of the municipality, its territory, or its property. The only difference was in the form of the machinery of government by which it was to be administered. Sec. 1 of article 4 of the City and Village Act provides, how cities already incorporated may change their form of government and adopt that act. Sec. 6 of said act provides that the court shall take judicial notice of the change in the form of government and that all laws or parts of laws not inconsistent with the provisions of that act shall continue in force and applicable to such city or village as if the change in organization had not taken place. It is also provided by Sec. 11 thereof that the ordinance and by-laws in force shall continue in force until repealed, notwithstanding the change in organization. Sec. 12 of said act provides that all the property of every kind and description which was vested in the municipal corporation shall be deemed to be vested in the same upon becoming incorporated under the provisions of that act. Notwithstanding the

fact that the city of Peru on July 5, 1890 passed the ordinance in question, we are of the opinion that the bridge in question is a continuation of Putnam street and extends from the north to the south side of the Illinois River. The bridge therefore, is within the corporate limits of the city of Peru and the defendant is responsible for its maintenance and repair.

City of Chicago vs. Powers, Administratrix, 42 Ill. 169 was a suit to recover damages resulting from the death of Mary Powers alleged to have been occasioned by the neglect of the city. It is charged among other things in the declaration that the deceased in attempting to pass over a certain bridge while near the north approach, the bridge being on the swing, stepped or fell through the opening into the river and was drowned.

In the decision of the case, the court in its opinion at page 172 said: "The question of negligence on the part of the city was fairly presented to the jury and they have found it against the city and we are of the opinion that the evidence sustains the finding. But it is contended that it was not the duty of the city to provide lights for the bridge. It might perhaps be a sufficient answer to say that the city regarded it a duty or they would ^{not} have undertaken its performance. But the charter authorizes the city to levy a tax for the purpose of defraying the expense of lighting the streets of the city. It seems to us to be obvious that a bridge over a stream, crossing a street is a part of the street. It is as much so as the cover placed over a drain or a sewer crossing a street. Persons travel over it, as they do over other portions of a street, subject, it may be to any delay that may be occasioned in opening and closing a draw. It is in, and must be a part of, the street. It is under the control of the city and kept in repair and attended under the city authorities, and we have no doubt that it was as much their duty to light the bridge as any other portion of the street."

In the instant case, the record discloses that the city exercised jurisdiction over it by appointing a bridge tender and paying a part of his salary and passed ordinances regulating the

traffic over it.

We have examined the evidence bearing upon the question of the negligence of the defendant and of the contributory negligence of the plaintiff's intestate. The evidence bearing upon each of these questions is conflicting. Under the state of the record, however, we are not prepared to say that the verdict of the jury was against the manifest weight of the evidence. It is not necessary to cite authority in support of the rule that the court should not set aside the verdict of a jury unless it was against the manifest weight of the testimony. Criticism is made of the instructions given on the part of the plaintiff. Instruction number 5 is particularly criticised.

Complaint is made of the giving of the fifth instruction that referred to the negligence as charged in the declaration.

In support of the defendant's contention it cites *City of Salem v. Webster* 192 Ill. 369.

The instruction in *City of Salem vs. Webster*, supra, is to be found fully set out and reported in 95 Ill. App. 129. In that case the instruction sets forth the duty of the city and told them that if they believe the plaintiff had been injured in the manner and form as charged in the declaration, the jury should find the defendant guilty. It directed a verdict and overstated the city's duty, but the giving of it was held not to be reversible error. The instruction in this case complained of, did not direct a verdict.

~~Moreover~~ Moreover, we have not been able to find anything in the record to show that the pleadings were permitted to go to the jury when it went out to consider of its verdict. We can indulge in the presumption that the court complied with the law and that the pleadings were not permitted to be taken out by the jury when it was sent out to consider the case.

Furthermore, it is said by the defendant that it was error to give the instruction because of the fact that the declaration does not clearly define the duty devolving upon the city. The defendant is in no position now at this stage of the case to raise any question as to the duty of the city charged in the declaration.

The declaration was pleaded to by the defendant. The instruction is based upon the theory that the intestate was a guest. The record does not make it clear whether he was a guest or one who was assisting in the joint enterprise of delivering meat products.

The eighth ~~first~~ instruction given by the court on the part of the plaintiff definitely submitted to the jury whether or not the intestate was a guest, and the only inference which can be drawn is that the jury held him to be a guest and that whether or not the driver was guilty of contributory negligence was immaterial as it could not be imputed to the intestate.

We are of the opinion that no reversible error was committed by the trial court in the giving of the fifth instruction for the plaintiff.

It is insisted that the court erred in refusing to give instructions number 27-28-29-30-31-32-33 and 34, tendered by the defendant. We have examined the refused instructions offered on the part of the defendant. The jury was fully instructed on the part of the defendant as to the law of the case. No harm was done by the refusing the offered instructions. We have examined all of the reasons assigned by the defendant for reversal of the judgment. We are of the opinion that no reversible error was committed in the trial of the case and therefore the judgment of the Circuit Court of La Salle County will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

95 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2581A.024

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 2 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

ROY F. HALL and J. E. GOEMBEL,)	
)	
APPELLEES)	APPEAL FROM THE CIRCUIT COURT
)	
-vs-)	OF WINNEBAGO COUNTY.
)	
JOHN AUGUST JOHNSON,)	
)	
APPELLANT)	

Jett, P. J.

Roy F. Hall and J. E. Goembel, appellees, instituted this suit in the Circuit Court of Winnebago County, against John August Johnson, appellant, to recover for attorney's fees alleged to be due them from the appellant for services rendered in connection with the contemplated condemnation by the Federal Government of certain lands owned by the appellant that were desired by the government of the United States in connection with Camp Grant.

A jury trial was had and at the close of all of the testimony, the court directed a verdict and finding in favor of appellees for the sum of \$5000.00.

Motions for a new trial and in arrest of judgment were made argued and denied. Thereupon judgment was entered upon the verdict of the jury for the sum of \$5000.00. This appeal by the appellant followed.

The declaration as originally filed consisted of one count and set up a contract between appellees and the appellant for legal services, and then averred a breach of the contract by the appellant. Subsequently the common counts were added by appellees.

The following is the contract declared upon by appellees:-

"This Agreement, entered into this 4th day of August, A.D. 1919, between John August Johnson, of the City of Rockford, County of Winnebago, and State of Illinois, party of the first part, and J. E. Goembel and Roy F. Hall, of the City of Rockford, County of Winnebago, and State of Illinois, parties of the second part, is as follows:

"Whereas, the United States Government is attempting to take, by condemnation, a certain farm owned by said party of the first party and whereas the said party of the first party is desirous of contesting said condemnation proceedings and he has this day employed the said parties of the second part to defend for him said condemnation proceedings, and agrees to pay said parties of the second part for their services a sum of money equal to 10 per cent of the amount he receives in excess of \$68,692.65, and further agrees that in the event that he does not receive in excess of \$68,692.65, then the said party of the first part is to pay the said parties of the second part a reasonable fee for services which they have rendered to him on account of said condemnation proceedings, and further in the event that under the law, the Government is unable to prosecute said condemnation proceedings, then in that event, said party of the first part agrees to pay said party of the second part a reasonable fee for services rendered in said condemnation proceedings, and it is further agreed that in the event that said cause is appealed to a higher court, or for any cause is dismissed or retired, in that event the said party of the first part agrees to pay said parties of the second part a fee equal to 15 per cent of all money received over \$68,692.65. "This agreement signed in duplicate this 12th day of August, A.D. ~~188~~ 1919."

To the declaration, the appellant pleaded the general issue, and gave notice of the evidence that he would offer under the general issue. The notices set forth that, instead of promoting the interest of appellant the appellees damaged and injured him and made it impossible for him to recover or receive the sum of \$68,692.65, the amount the government was at one time willing to pay in settlement of the condemnation proceeding; that the appellees rendered poor and unvaluable service as ^{la} lawyers to the appellant; and by their methods and practices with the government and officials, the latter absolutely refused to have anything to do with appellees in the settlement or adjustment of the condemnation proceeding; and because the government refused to do business with the appellees, the appellant was forced to employ other counsel and that the services rendered by appellees were of no value whatsoever to appellant.

Two distinct grounds are urged by appellant for a reversal of the judgment. It is first contended that the contract entered into by which he employed appellees as attorneys, barred him from compromising his claim against the government, and that this rendered the contract null and void.

We have examined the contract with the view of ascertaining, as to whether or not the contention of the appellant in this respect, is well founded. In our opinion, there is nothing in the language used in the contract that supports such contention nor by any reasonable construction can it be given that interpretation.

The main question that arises on this record is, as to whether the court erred in directing a verdict. The record discloses that the appellant was the owner of 240 acres of land and the government located Camp Grant on the same and adjoining lands under a lease with the appellant and other owners of land. At the expiration of the lease, which was June 30, 1919, the Government began condemnation proceedings in the District Court of the United States at Freeport, and the appellant employed appellees to represent him as his attorneys and they entered into the contract declared upon in this cause.

The evidence shows, appellees, shortly after entering into the contract, began work for appellant; that one of appellees began the securing of witnesses to be used upon the trial of the condemnation case; prospective witnesses were called upon and interviewed; they were taken to the farm in question; the soil was examined. It appears that a part of the land was river frontage with a number of trees thereon. The trees were inspected, and the witnesses were secured to estimate the value of the river front. It took some three weeks time in going to and from the farm with the prospective witnesses and in the examination of the same.

The record discloses, that while one of appellees was making preparations for trial, by way of obtaining witnesses and viewing the premises, the other was investigating the law, preparing a brief and instructions.

A demurrer was prepared to the petition filed by the government; that appellees, or one of them, attended the Federal Court at

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Freeport a total of twenty times or more on the hearings or expected hearings in the condemnation proceeding; that one of appellees attended the hearing before Judge Lendis in Chicago a number of times on the argument and hearings on the demurrer to the petition. The demurrer to the petition was overruled. A motion to dismiss was made; a number of hearings were had in Chicago and finally the motions to dismiss was overruled. Subsequently, appellant decided that he did not want to part with his land and was desirous of defeating condemnation proceedings. Appellees caused to be introduced in Congress a bill, the object of which was to take out of Camp Grant the lands of appellant and withdrawing from the Secretary of War authority to condemn the lands.

The record further discloses that a number of communications passed between appellees and parties in Washington regarding the legislation sought; that visits were made by appellees to the City of Washington; that one of appellees spent about two weeks in Washington looking after the proposed legislation; and that the law desired was finally passed and the lands of the appellant withdrawn from Camp Grant and the authority to condemn the premises in question had been taken away from the Secretary of War.

Owing to the legislation passed by Congress, the land was returned to appellant.

On the trial, appellees offered testimony bearing upon the question of the value of their services. Appellee Hall, testified that he had practiced at the bar a long while and that in his opinion the usual, reasonable and customary price charged and paid for such services in Winnebago County was of the reasonable value of \$5000.00.

Hypothetical questions were put to the witnesses embodying the facts as relied upon by appellees for a recovery and including the kind and character of services rendered by them.

Robert K. Welch, who had practiced at the bar of Winnebago County for forty years, and who had been Judge of the Circuit Court for a number of years, testified that in his opinion the usual, reasonable and customary price paid for such services was the sum of \$5000.00.

B. J. Knight, a lawyer, who had practiced at the bar of

Winnebago County for twenty years or more, testified that in his opinion the usual reasonable and customary fee charged and paid in Winnebago County for such services was between \$5000.00 and \$6000.00.

The appellant offered no evidence to contradict the making of the contract; he offered no proof that the services were not rendered; he did not dispute the evidence offered by appellees of the value of the services.

Appellant contends that even though appellees made out a case and the appellant failed to make out a defense, the assessment of damages was a question of fact for the jury; that this is true although the contract is valid.

Under our practice, the trial court may properly instruct the jury to find for the defendant, when the plaintiff wholly fails to make proof of any material part of his case. The court may also allow a similar instruction in behalf of the plaintiff. Such an instruction is not proper if there is any competent evidence tending to support a different verdict. *Anthony et al vs. Wheeler*, 130 Ill. 128.

An instruction to find for the plaintiff in an action for rent is properly given where there is no conflict in the evidence establishing the right of recovery and there is no evidence tending to support the defense. *Marshall vs. The John Grosse Clothing Co.*, 184 Ill. 421.

In *Marshall vs. The John Grosse Clothing Co.*, *Supra*, at page 425, the court used this language:- "It is also claimed that the court erred in instructing the jury to find a verdict for the plaintiff. As there was no conflict in the evidence it was a question of law whether on the facts plaintiff was entitled to a verdict, and as there was no evidence tending to support any defense interposed by appellant, the court properly instructed the jury to return a verdict for the plaintiff."

If the facts in favor of the plaintiff are clearly established and are sufficient and undisputed, it is proper for the court to instruct a finding for the plaintiff. *Orleans vs. Platt* 99 U. S. 678 (25 L. ed. 404).

Where the plaintiff's evidence makes a prima facie case and defendant offers no evidence, the court should, on motion, direct

a verdict for the plaintiff. Mason vs. Sault 93 Ver. 412, 108 Atl. 287, 18 A.L.R. 12 1426. To the same effect is Johnsbury vs. Thompson 59 Ver. 300, 59 Am. Rep. 731 and 9 Atl. 571.

A verdict should be directed for the plaintiff where there is no conflicting testimony and the evidence clearly shows the right of the plaintiff to a verdict, or the evidence reasonably admits of no other conclusion than the one claimed by the plaintiff, or there is no competent evidence tending to support a verdict for the defendant. And a direction in favor of the plaintiff is proper where there is no conflict in the evidence and no evidence to support the defenses set up in the answer, or where the only defenses set up are of such a character as not to be available against the plaintiff, or the plaintiff's case is clearly made out and the only defense attempted to be proved is not pleaded.

Again, the plaintiff is entitled to a direction in his favor where the right to recover is overwhelmingly shown or where the plaintiff's evidence is sufficient to warrant a verdict in his favor and no evidence has been adduced by the defendant appreciably tending to overthrow the case made by the plaintiff. The defendant on such a motion is entitled to the most favorable construction of the evidence which it will reasonably bear and the plaintiff's evidence must be of such clear and undisputed character that no question of fact is left for the finding of the jury. The plaintiff is not entitled to a directed verdict where there is some evidence in support of the defenses, or there is a conflict in the evidence, or where it cannot be said that all reasonable men must have drawn from the evidence the same conclusions in favor of the plaintiff, or where the plaintiff has failed to prove a material issue as his damages. 26 R.C.L. 1073-74 Sec. 79.

Where the only question involved is the legal effect of undisputed or written evidence it is for the court, and a verdict may be directed. Vol. 6 Encyclopedia of Pleading and Practice 683.

Eden vs. Drey 75 Ill. App. 102, was a case in which an inn-keeper lost the baggage of his guest and the guest brought suit to recover the value of the goods so lost and upon the trial the plaintiff proved the loss of the goods and their value and the defendant

offered evidence, but at the close of all the evidence the trial court held that there was no evidence to establish a defense and instructed the jury to find for the plaintiff, and on appeal the court said:-

"It would appear from this record that no other result could have been properly obtained than that which was directed by the trial court."

Summers et al vs. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102, is a case in which the appellant agreed to ~~sell~~^{sell} appellees certain iron at a particular price. Appellant refused to deliver the iron. Appellees purchased iron in a higher market, they brought suit for the damages caused on account of the failure of appellant to deliver. On the trial appellees proved the contract, and the failure to deliver and that they had bought in the market together with the price for which they had purchased. The court directed a verdict for the plaintiff for the total amount claimed as a difference between the contract price and the price at which the evidence shows appellees purchased. In the decision of the case the court at page 112 said:-

"The making of the written contracts being admitted at the trial, the court having construed them and held that the printed line in the caption of the letters was no part of such contracts and having resolved as a matter of law that there was no implied condition in them growing out of their nature, the alleged deficit in the deliveries not being denied and there being no conflict of testimony in respect to the state of facts upon which the damages were to be based, there remained in the cause no question that required submission to the decision of the jury and it was not manifest error to direct a verdict for the plaintiffs and instruct the jury as to what amount to assess the damages."

In the instant case, we have one in which there was a contract entered into. It was such a contract as the parties had a right to make. In other words the contract was not in violation of any law. There was definite specific and detailed evidence of the services performed under the contract by appellees. There was positive testimony showing the value of the services rendered. The performance of the services was undisputed. There was no conflict in the evidence as to the value of the services. The evidence reasonably admits of no

other conclusion ~~than~~ than the one claimed by the plaintiff. There is no competent evidence tending to support a verdict for the defendant.

In view of the state of the record what result should have followed other than that was done by the court? It is evident that a finding contrary to the one returned by the jury would have been vacated. On due consideration we have reached the conclusion that under the facts as disclosed by the record in this cause, the court was warranted in directing a verdict. The judgment of the Circuit Court of Winnebago County is therefore affirmed.

Judgment Affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

96 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk. 283 LA. Oct 11

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 2 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

V. M. MERCHANT, doing business
as MERCHANT PLUMBING & HEATING
COMPANY,

APPELLEE

-vs-

BESSIE KNIGHT, JESSIE B. BAXTER
and W. E. GROGAN,

APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF WINNEBAGO COUNTY.

MAY TERM, 1930.

Jett, P. J.

This suit was instituted by V. M. Merchant, doing business as Merchant Plumbing and Heating Company, appellee, in the Circuit Court of Winnebago County, against Bessie Knight, Jessie B. Baxter and W. E. Grogan, appellants, to foreclose a Mechanic's Lien.

On a hearing the Chancellor entered a decree in favor of the petitioner and directing Bessie Knight to pay the sum of \$299.46, with interest from the date of the decree, together with the Court costs within twenty days, and ordering the Master-in-Chancery to make a sale of the premises, mentioned and described in the petition of appellee, if she failed to make such payment. It is from this decree that the appellants prosecute this appeal.

The record discloses, that on November 14, 1923, George E. Scott, owner of Lot 2, in Block 27, Edgewater Subdivision in Rockford, Illinois, together with his wife, Blanche O. Scott, entered into a contract for deed for the sale of said premises to Bessie Knight for the sum of \$3800.00, \$400.00 of which was paid at the time of the execution of said contract, the balance, according to the terms of the contract, were payable at the rate of \$30.00, per month, beginning of the 14th day of December 1923.

On the 19th day of November 1923, the said George E. Scott, together with his wife, Blanche O. Scott, conveyed his interest in the said premises aforesaid to the appellant, Jessie B. Baxter, by warranty deed and by the assignment of the contract made with the said Bessie

Knight.

On July 1, 1925, Fessie Knight made a contract with appellee for the installing of the plumbing in question in the residence situated on the said described premises. Appellee completed the installation of the plumbing in February 1926. Subsequently, Bessie Knight sold the premises to one Grogan and entered into a contract for a deed. Grogan defaulted in his contract and Bessie Knight terminated the same and evicted him from the premises. Since that time Bessie Knight has rented the premises in question, either personally or through her agent Bert Baxter and has turned the rent over to Jessie B. Baxter to apply on the contract by which she is purchasing the same. No claim is made that Jessie B. Baxter or any one for her ordered the plumbing made or agreed to pay for it.

The evidence shows that Bessie Knight told Bert Baxter, the father of appellant, Jessie B. Baxter, that she had been ordered to have some plumbing done in the house and that he, Bert Baxter, told her she had better get it done, and that Bert Baxter was at the premises at one time when the plumbing was being installed.

The evidence also shows that Bert Baxter conducted all of the negotiations in the name of Jessie B. Baxter, at the time the property was obtained by her, and that she furnished the consideration.

It is further shown that the contract Bessie Knight had was left at the office of Bert Baxter and all payments made by her were made to Bert Baxter at his office. That Bert Baxter, in making the collections credited Mrs. Knight's account and also credited Jessie B. Baxter's account with the cash and payments.

The evidence discloses that Bert Baxter redeemed the premises from taxes two or three times.

The question arising By reason of this record is, whether or not the interest of appellant, Jessie B. Baxter, who held the legal title to the premises in question as security for the balance of the purchase price agreed to be paid to her is subject to the claim for lien of appellee. There is no dispute as to the facts as they are disclosed by the record herein.

The chancellor decreed that appellee have a lien on the said described premises for the amount so found to be due from

Bessie Knight and that Bessie Knight pay to appellee the sum of \$229.46, with interest from the date of the decree, together with the costs within twenty days, and that in case the said Bessie Knight should make default in the payment of said sum of money within the time as provided in the decree, or that said sum was not paid by some one other than Bessie Knight, that the Master-in-Chancery should make a sale of the premises or such part or parts thereof as may become necessary to pay the amount due at public venue to the highest and best bidder.

In view of the state of the record, we are of the opinion it was error for the Chancellor to decree a sale of the entire premises for the satisfaction of the lien in the sum of \$299.46, as found. Bessie Knight was primarily liable for the amount of the lien occasioned by the installation of the plumbing that was done by appellee, and her interest in the premises should be first subjected to a sale in satisfaction of the lien before any interest in the premises of Jessie Baxter could be attached. Furthermore, inasmuch as Jessie B. Baxter does not appear to have been a party to the contract or to have personally known of the installation of the work or improvement being made, that only the increase value of her interest occasioned by reason of the making of the improvement can be made the subject of lien. Owing to the conclusion we have reached, the decree is reversed and the cause remanded with directions to enter a decree, directing a sale of the interest of Bessie Knight in the premises and in the event that her interest does not sell for a sufficient sum to pay the claim of appellee, then the increase value added to the premises by reason of improvements may be sold.

Reversed and Remanded with Directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

977
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

258 I.A. 625'

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

STEPHEN BUNKER, by Alice

Bunker, his next friend,

Appellee

-vs-

E. FORREST HERDIEN,

Appellant

Appeal from

Circuit Court

Iroquois County.

Boggs, J.

An action on the case was instituted by appellee in the circuit court of Iroquois county against appellant, based on a charge of negligence. The declaration consisted of three counts, and, as finally amended, the first count charged that on September 24, 1923, appellant, a physician and surgeon, advised that appellee was suffering from appendicitis and that an operation should be performed; that appellant was employed to perform said operation and that he "so unskillfully and negligently performed the operation that, through his want of skill when closing the incision, he left a roll of gauze, commonly called a sponge, in the abdomen of the plaintiff"; that by reason thereof appellee became sick and was caused to suffer unnecessary pain and distress, etc. The second count is substantially the same as the first, except that it charges that appellant "negligently left in the cavity in the plaintiff's body, and carelessly inclosed therein a large quantity of cloth and gauze, and negligently sewed, stitched and inclosed the same in plaintiff's body, and negligently suffered the cloth to remain in his body from the 24th of September, 1923, until the 2nd day of November, 1923." The third count charged "that the sponge alleged to be so left (in appellee's abdomen), prevented the passage of matter into the intestine, whereby said matter passed out through the incision in the body of the plaintiff, by reason whereof the wound could not and would not heal, and the cloth and gauze caused great pain and suffering," etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for the sum of \$2,000. To reverse said judgment,

this appeal is prosecuted.

It is first contended for a reversal of said judgment that the court erred in refusing to exclude the evidence and to direct a verdict for appellant, on motion made by him at the close of appellee's evidence. In view of appellee's evidence, as we shall hereafter discuss the same, it is only necessary for us to say that, taking said testimony as true, with all reasonable inferences to be drawn therefrom, the court did not err in refusing to exclude said evidence and to direct a verdict.

It is next contended that the verdict of the jury is against the manifest weight of the evidence.

Appellee, at the time in question, was seven years of age, and lived in Kankakee. A few days prior to September 24th, Dr. Guertin of Kankakee had diagnosed his case as appendicitis. In the early morning of said day, appellant, a resident of Watsdon, who was called by appellee's parents, diagnosed appellee's condition as appendicitis. About 1:30 in the afternoon, appellant operated, assisted by Dr. Guertin.

Following the operation, appellee remained in the hospital for some four or five weeks. Thereafter he was removed to the home of his parents. Appellee's father and mother both testified to the effect that, following said operation, appellee suffered great pain; that he lost weight and became quite emaciated; that he suffered from gas pains and, in order to relieve the same, appellant directed the giving of enemas. Appellee's mother further testified: "On November 6, 1923, he had been suffering so terrible with pain the whole forenoon, I gave him two enemas, and it didn't help. Two o'clock I gave another, this time I flushed down a piece of gauze. Came from his rectum. That bottle (indicating bottle handed to witness) holds the piece of gauze. After this gauze came from Stephen's rectum, he was in bad condition for a few days. ***** November 6, 1923, I showed this sponge to Doctor Herdien. * * * Doctor Herdien said, 'And that went around his intestines and came out of his rectum; that is a miracle; that wouldn't happen again in a hundred years and anybody live through it.'"

Appellant testified with reference to said operation as

follows:

"Starting the operation, I made the incision. Two types of sponges were used. Until we incised through the abdominal cavity, Dr. Guertin did all the sponging. Thereafter I did it all. * * * I did no sponging before the abdomen was actually opened. * * * With the abdomen opened, I found general peritonitis, but no adhesions of the bowel wall to the wall of the appendix; everything was free. Feces and pus were flowing all over the abdomen. When I cut through, feces and pus seeped out. I saw an opening behind the appendix the size of my finger, and I saw there was an abscess cavity that lay above the kidney. A pint of thick, green pus came out of that cavity. My incision was four or five inches long--the normal incision. When I got in, after this pus seeped out, I pressed the outside of the abdomen a little, then I used my gloved hand inside and scooped until fairly dry. I called for a hot lap sponge. * * * It had been washed in hot salt water. Sister Mary Josephine handed me the lap sponge. Dr. Guertin didn't hand me any sponges in this operation. He did nothing except hold open the incision. I put the lap sponge in to absorb the feces and pus, handed it back to Sister Josephine and she gave me another. It was never out of my hand. I did that two or three times before it was clean enough to hunt for the appendix. I never used more than one of these laparotomy sponges at a time during this operation. After the interior was dry I found the appendix four-fifths sloughed off; it had busted and secretions had made it so fragile it had rotted off completely. Only a half-inch of the appendix was left fastened to the small bowel. I searched for the appendix ^{but didn't find it.} ~~and dissected it loose~~ The boy was in too desperate shape to hunt and it would come out with the drainage. I went after the stump of the appendix and dissected it loose from the small bowel for it wouldn't stand to be tied or clamped off. It was like liver tissue. * * * As it was, there was a very small hole in the appendix itself. I inverted this, turned the appendix outside in. It was gangrenous back an inch around the appendix. I knew if I didn't make a check valve there, it would leak toxic products, poison, coming from the bowel, so I put a purse string suture, a linen thread in a needle sewed in the bowel

over an inch from the appendix in the first healthy tissue there.

* * * I saw there was no help for a fecal fistula so I called for the largest drain tube. A fecal fistula is caused by a sloughing off of gangrenous bowel that would allow gas and bowel content to leak out the center of this purse string suture. It is a hole in the bowel which would appear in a few days. It is poisonous, dead tissue sloughing off. Before we put in the tube, I washed out the abdomen with salt water; filled it with ether to kill the germs and held the wound together with my fingers while the surgical nurse counted the nut sponges which had been thrown on the floor. None of them were used by me after this abdomen was opened. After the time the wound was held together and the nurse had counted the sponges and reported no sponge missing, I put in our largest long drainage tube; its diameter is five-eighths of an inch internally.

* * * Volumes of gauze are loosened and soaked in hot boric acid, then wound around the tube sticking out of the incision. We put a large amount of padding outside to keep moisture there as long as possible." .

In rebuttal, appellee offered in evidence a letter written by appellant to Nelson Bunker, the father of appellee, under date of November 19, 1923, which, among other things, stated:

"I was telling my wife after I left you yesterday that it would be too bad if you really brought suit against the hospital since if the truth were known, the accident may have saved Stephen's life. You will remember that I told you a portion of the caecum-- the large bowel to which the appendix is attached-- was denuded of peritoneum, and so friable that a needle would not do anything but tear through, and rather than resect it-- the only thing I could have done--I returned it in the belief that a fecal fistula, if it occurred, would be less dangerous to life than exposing a large fresh surface to intoxicating pus. That fistula evidently occurred, and the gauze was there to block it, and by the time that nature had started regeneration it had come through--and in the meantime prevented that terrible overflow of fecal matter that so often kills children, who seem to have much less resistance to that intoxication than an adult. On top of that I'm pretty sure that the sisters

were half scared to death when you showed them that sponge, and they acted so peculiar because of that fact."

A proper foundation having been laid on the examination of appellant, Dr. R. A. Buckner was asked the following question: "Doctor, I will ask you whether or not, on December 29th, 1925, in the Iroquois Hospital here in the city of Watsela, this defendant said to you this or this in substance--'I left a sponge in Stick Bunker's boy and it came out in an enema several weeks later'-- that or that in substance?" He answered "Yes, sir."

The sponge or guaze which appellee claims passed from his body was admitted in evidence. Appellant testified that none of the sponges used, either by Dr. Guertin or by himself, at the time of said operation, was of the character of the sponge offered in evidence by appellee. Appellant's testimony as to the character of sponges used and their use during said operation, is corroborated by the testimony of Dr. Guertin and of Sister Mary Josephine, who had charge of said sponges. She testified that she counted the sponges that were used and those returned, and that the count tallied.

It is strenuously insisted by counsel for appellant that, not only does the evidence on the part of appellant conclusively show that all sponges used were accounted for, and that the sponge offered in evidence by appellee was not the same character of sponge used in the operation, but that, under the testimony of Dr. Benjamin, Dr. Gibson, Dr. Guertin, Dr. Mickerson and himself, it was so improbable that a sponge left in the cavity in question could have entered appellee's bowel and passed out through the rectum, as claimed, as in and of itself would render the verdict against the manifest weight of the evidence. Said witnesses all testified to the effect that if a sponge had been left in such cavity, it would have been expelled along the line of least resistance, and that such line would have been through said incision. The cross examination of said physicians discloses that a sponge so left may in fact enter the intestines and pass out through the rectum. In view of this testimony, and of the admissions made by appellant, we would not be warranted in holding that the verdict is against the manifest weight

of the evidence.

It is next insisted that the evidence fails to show that appellee is entitled to any substantial damages. It is conceded that appellee suffered severe pain, but it is contended that these pains were the proximate result of general peritonitis. It was a question for the jury whether or not, if appellant was in fact guilty as charged, appellee's pain and suffering was increased thereby. Without going into a further discussion of the evidence, it is only necessary to say that we are not prepared to hold that the jury was not warranted in finding that appellee was entitled to substantial damages. Neither are we prepared to hold that the damages awarded are so excessive as to warrant a reversal on that ground.

It is next insisted that the court erred in giving appellee's third, fourth, fifth and sixth instructions.

It is contended that the third, fifth and sixth instructions are erroneous in requiring "the degree of skill and care to be exercised by the defendant to be that which a reasonably skillful physician and surgeon in the locality where an operation is performed would have exercised under the same circumstances and conditions." Appellant was not prejudiced by the giving of these instructions. Even if said instructions were not entirely accurate, appellant is not in a position to complain, as his given instruction number 8 was of like character.

The objection to instruction number 4 is that, "in charging that he (appellant) carelessly failed to remove one of said sponges, the instruction directed and instructed the jury to find something which is entirely unsupported by any evidence in the record." It is only necessary to say that the letter written by appellant, together with the admissions testified to by Dr. Buckner and by appellee's mother, discloses that said point is not well taken. The other objections made to this instruction are not well taken.

It is next insisted that the court erred in refusing appellant's refused instructions six and seven. The giving of instructions of the character of no. 6 has been condemned. No. 7 is not carefully guarded. The court did not err in refusing said instruction,

It is next insisted that the court erred in its rulings

on the evidence. In this connection it is contended that the court permitted counsel for appellee to propound to the expert witnesses hypothetical questions which assumed that the gauze in question was left in appellee's abdomen and came out of his rectum, this being a controverted question of fact. In propounding hypothetical questions, counsel have a right to assume the facts which their evidence tends to prove, as a basis for the expert opinion. *Chicago & E. I. R. R. Co. v. Wallace*, 202 Ill. 126-133; *People v. Geary*, 297 Ill. 608-615. The court did not err in this connection. Even conceding that the court erred as contended, appellant is not in a position to successfully urge this objection, for the reason that the same fact was assumed in a hypothetical question propounded by counsel for appellant to Doctors Guertin, Benjamin and Gibson. It might also be observed that the objections to the hypothetical questions were of a general character. Objections to hypothetical questions should point out specifically the ground of the objection. *Chicago Traction Co. v. Roberts*, 229 Ill. 481-485; *People v. Mandell*, *Chicago & E. I. R. R. Co. v. Wallace*, *supra*; *People v. Scott*, 284 Ill. 458-467; *Logan v. Mutual Life Ins. Co.*, 293 Ill. 510-514; *People v. Mandell*, 306 Ill. 413-418.

It is also contended that the court "erred in refusing to permit the defendant to introduce evidence that the present lawsuit was not instituted in good faith". The proffered testimony was with reference to what was said and done by appellee's father. Inasmuch as this suit is prosecuted in appellee's name and for his benefit, what his father may have said cannot be imputed to appellee. The court did not err in this ruling.

It is also insisted that the court erred in refusing "to specifically instruct the jury to disregard prejudicial and inflammatory questions put by counsel for plaintiff to witnesses, and further erred in permitting counsel for plaintiff in his closing argument to the jury to make prejudicial remarks." Where the objections were well founded, the court sustained the same and instructed the jury that statements of counsel as to facts not in evidence were to be wholly disregarded. This assignment of error is not well taken.

Certain questions complained of were propounded to appellant for the purpose of showing that, pending this controversy, he con-

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1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

—How do I know you're not a spy?

veyed his property to his father and the father conveyed it to appellant's wife. The court sustained objections to all of these questions. While we are of the opinion that this was not the character of case where such testimony would be admissible, still we hold that no serious prejudice resulted to appellant by reason of such questions.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

98 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2501.A. 020-2

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 2 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MORGAN D. WISE,	:	
Plaintiff in Error	:	
vs-	:	Error to Circuit
	:	Court of Winnebago
	:	County.
EDITH M. KUHARSKE,	:	
Defendant in Error,	:	

JONES J:

Plaintiff, Morgan D. Wise, brought a suit against defendant, Edith M. Kuharske, in assumpsit to recover commissions as a real estate broker. A jury returned a verdict in favor of the defendant. Judgment was entered thereon and plaintiff has brought the cause to this court by writ of error.

The declaration contains three original and three additional counts, each of which avers the employment, the procuring of a purchaser, able, ready, and willing to buy upon the terms proposed, the amount of commissions thereby earned, and the refusal of the defendant to pay. The defendant filed a plea of the general issue with notice that she would offer proof that the purchaser was unable to buy at the price and terms agreed upon and that the plaintiff, at the time of producing the purchaser, knew he was unable to purchase upon the agreed terms.

Mrs. Kuharske was the owner of a farm of eighty acres in Winnebago County. She employed Wise as her broker to sell the farm. On December 10, 1927, he produced one Simon P. Larson, who entered into a written contract with the defendant, whereby he agreed to purchase and she agreed to sell the farm for \$24,000 on the following terms:- The purchaser to assume a first mortgage of \$5,500, a second mortgage of \$1,000 to pay \$4,000 cash, \$1,000 on May 1, 1928, and the remainder in five equal annual payments of \$2,500 each, beginning January 1, 1929 with six per cent interest per annum. The contract provided that the defendant would furnish an abstract showing merchantable title.

Most of the material facts must be gathered from the

testimony of the parties litigant. In many respects there is a decided conflict in their testimony. However, it is undisputed that when Mrs. Kuharske first went to see Wise, she told him she was in financial distress and needed money, especially for the purpose of educating two of her sons. Wise told her he thought he could find a purchaser. They discussed the subject of commissions and agreed upon the amount. He took a seven day option to himself, which he did not exercise. On the day the contract was entered into with the purchaser Larson, Wise called the defendant by Phone and told her he thought he had a buyer, provided she would accept a lesser sum than \$4,000 as a down payment. She declined to do this, and later Wise again called her and said he had everything arranged.

According to the testimony of the defendant, she asked the plaintiff who the purchaser was. Plaintiff replied that he was a manufacturer; whereupon Mrs. Kuharske said, "Then I will be sure of getting my \$4,000 cash right away; there won't be any delay?" He replied, "Yes, it is all right for you just the minute the abstract is brought up to date. It is in the bank waiting for you." He told her he had prepared a contract which he would send her, together with a binding check of \$200. He added that he could get the whole \$4,000 by the end of the week if the abstract was completed. She further testified that relying upon plaintiff's representation that the down payment was in the bank ready to be delivered when the abstract was completed, she signed the contract.

Wise denied that he told Mrs. Kuharske that the \$4,000 was in the bank ready to be paid, when a proper abstract was furnished, or that he said anything about \$4,000 being in the bank. He testified that he told her the sale would go through according to the terms of the contract.

The abstract was delivered about December 17th. The purchaser made no objections to the title, but failed to make the down payment. On January 4, 1928, he wrote a letter to Mrs. Kuharske, stating that when he entered into the agreement with her, he had the promise of four other parties to participate with him in the deal, but they had backed out on account of price and terms, so that

he was unable to go through with the deal. He advised Wise to the same effect. A short time afterward, Mrs. Kuharske sold the farm to another party not connected with the plaintiff.

The defendant attempted to interpose a defense of fraud on account of the alleged misrepresentations of her broker, and also a defense that the commission was due and payable only out of the first substantial payment made by the purchaser. The last mentioned defense was not included in the notice given under the general issue and had no proper place in the trial. The real question involved is whether or not Wise acted in bad faith toward his client by misrepresenting to her the facts concerning the down payment agreed upon. As heretofore observed, the evidence upon this question is a conflict. Mrs. Kuharske had no acquaintance whatever with the prospective purchaser. She had never seen him at the time she entered into the contract to sell her farm to him. All she knew about him was what she learned through her agent. The first time she ever met him was about the time of the trial of this cause in the circuit court. It developed on the trial that he did not have \$4,000 in the bank when he executed the contract. All he had was a little over \$600. He was not dealing for himself ~~alone~~ alone, but for four others as well, and this fact was known to Wise, but unknown to Mrs. Kuharske.

Plaintiff insists that even though the prospective purchaser was not able to make the agreed down payment, he is entitled to his commissions, because Mrs. Kuharske accepted Larson as a purchaser, ready, ^{able} ~~able~~, and willing to perform. In support of his contention he cites Fox v. Ryan, 240 Ill. 391, and other cases, but they do not support his position. The rule laid down in those cases is that a broker is entitled to his commissions, notwithstanding the purchaser fails to carry out the contract and make the payments agreed upon, provided, however, the acceptance of such purchaser by the owner was without fraud or deception on the part of the broker. In the instant case, the defense made by Mrs. Kuharske is that she accepted the purchaser because of the fraudulent representations made by the broker of the purchaser's

he was unable to comply with the law. He advised me to go
some office. I went there afterwards, but I did not find
to get any more information.

The defendant attempted to introduce evidence of
in the account of the defendant's statement to the jury,
and also a defense that the defendant was not a party to the
of the first defense trial payment made of the defendant. The first
mentioned defense was not included in the notice given under the
general issue and had no proper place in the trial. The defendant
then attempted to introduce evidence that he had been paid for his
claim of misrepresentation to get the above mentioned fee and
amount agreed upon. As the defense objected, the evidence was
this motion is a matter of fact. The defendant had no objection
whatever with the proposed evidence. The defendant then said
at the time she entered into the contract to sell her house to
him. All she knew about him was what she learned through her agent.
The first time she ever got him was about the time of the trial
of this case in the city court. It happened on the trial that
he did not have \$5,000 in the bank when he started the contract.
All he had was a little over \$300. He was not dealing in the
business alone, but for four others as well, and this was the

defendant insists that even though the representative
thereafter was not able to make the agreed loan payment, he is en-
titled to his commission, because he, the defendant, accepted the
as a warehouse, ready, and willing to perform. In response
of his contention he cites the law. The law says that in
cases, but they do not require the defendant. The law says that
in those cases in that a broker is entitled to his commission,
notwithstanding the warehouse failed to carry out the contract and
make the payments agreed upon, provided, however, the warehouse
of such warehouse by the owner was not found to be a condition on
the part of the broker. In the instant case, the defense asks by
Mrs. Whitely is that she negotiated the purchase because of the
defendant's representations made by the broker on 11th November.

ability to make the down payment. This case is also to be distinguished from other cases in that the contract of purchases contemplated the payment of \$4,000 in cash upon the furnishing of an abstract showing merchantable title. As to this payment, there was no extension of credit. In a sense, the payment was to be contemporaneous with the execution of the contract and delivery of an abstract showing a merchantable title. Common fairness would compel the payment of this suit before a broker would have any right to claim that he had actually produced a purchaser able to buy upon the agreed terms.

The pleadings do not define the issues with the definiteness ordinarily required, but counsel for plaintiff have correctly stated, on page 10 of their brief, that because the case had been tried by both sides of the theory that a good plea of fraud had been filed, the "record must be considered as though an adequate plea of fraud was in the record." The jury heard the evidence and saw the witnesses. They were in a better position to judge of their credibility than a court of review can be. Their opportunity to determine where the truth lies was better than ours is, and we feel that their verdict is not against the manifest weight of the evidence, but is in thorough accord with it.

It is urged that the trial court made improper rulings upon the admission of evidence. Some of the questions propounded to witnesses were not in good form, but the defendant had an undoubted right to state as a matter of fact that she relied upon the representations made by her broker when she executed the contract with O Larson. The conversation between plaintiff's son and Wise, although it was had more than two weeks after the contract was entered into, was properly admitted, in corroboration of other testimony as to similar statements made by plaintiff prior to the date of the Larson contract.

The instructions complained of by counsel for plaintiff are subject to much of the criticism made against them, and were it not for our belief that justice has been done in this case and that upon no theory should the plaintiff be permitted to recover under

under the evidence in this record, we would be compelled to reverse the judgment and award the case. It is more important in the administration of justice that litigation should end in the attainment of substantial justice, than that a record of proceedings should be built up which is without flaw or blemish. (West Chicago Street R. R. Co. v. Maday, 188 Ill. 308.)

The judgment in this case is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

99 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff. 256 LA 625

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 2 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Matter of the)	
Estate of Mary B.)	Appeal from the Circuit Court
Morriarity, Deceased.)	of Will County.

JONES, J:

This litigation is to determine the ownership of certain negotiable bonds of the face value of \$12,000, with coupons attached. Appellant, the Will County National Bank, as administrator of the estate of Mary B. Moriarity, deceased, claims that the bonds belong to the estate. Appellee, Mazie Bradley, claims they belong to her and that she acquired them through a gift from Mary B. Moriarity, in her lifetime. The proceedings were instituted in the probate court where an order was entered adjudging the bonds to be the property of the said estate. An appeal was taken from that order to the circuit court, which Court held the bonds to be the property of Mazie Bradley. The administrator then appealed to this Court.

The material facts are that Mary B. Moriarity was the owner of considerable property and made investments in bonds and other securities. Mazie Bradley, her niece, was a widow with three small children. Her husband died in 1925 leaving her little property. Mrs. Bradley was crippled in both hands and feet. She was unable to get about the streets, except with the aid of some other person. Her aunt, Mary B. Moriarity, manifested considerable affection and sympathy. She expressed her sorrow over her niece's misfortune and declared her intention to assist in rearing the children. So far as the record discloses, she had no other dependent relatives. She made frequent contributions to the support of the family and defrayed much of the expense of sending the children to school.

She rented a safety deposit box from The Illinois Trust Safety Deposit Company under a contract with that Company from April 24th,

1923, at an annual rental of \$3.50. In this box she kept her securities. The contract contains a printed form and provides for the appointment of a "deputy" who is authorized to enter and have access to the Safety Deposit Box. This form was filled out for the appointment of Mrs. Bradley as such deputy and was signed by Mary B. Moriarity. There were two keys to the box. One was given to Mary B. Moriarity and the other to Mrs. Bradley. It appears from an endorsement afterwards made on the contract that a deposit fee of \$1.00 for the key given to Mrs. Bradley was refunded and her key returned to the Company.

In 1925, Mrs. Bradley purchased from Halsey, Stuart & Company, bond brokers, a \$500 bond of the Chicago North Shore & Milwaukee Ry. Co. The brokers delivered the bond to her in an envelope denominated "Form 99". The envelope is about ten inches long and five inches wide. On the back is printed matter with spaces for such data as, interest dates, amounts, maturity, number, etc. It has in large letters near the center, the words "PROPERTY OF" and immediately underneath there is a line where the owner's name and address may be written.

About the same time, Mrs. Bradley acquired from her aunt Mrs. Moxley, a \$500 bond of the American Telephone & Telegraph Company. It was placed with the other bond in the envelope furnished by Halsey, Stuart, & Co. The record shows that Mrs. Bradley, on various occasions, went with her aunt to the Safety Deposit Company and that she never was there except in the company of her aunt. Upon the death of the latter, a number of her heirs, including Mrs. Bradley, assembled at the Deposit Company and there, in the presence of an inheritance tax official, the safety box was opened. In it were various securities belonging to the decedent and also a cloth bag of heavy material. When the bag was opened, it was found to contain the Halsey, Stuart & Co. envelope of Mrs. Bradley. This envelope not only contained the two bonds purchased by Mrs. Bradley, and conceded to be hers, but it also contained the bonds which are involved in this litigation.

1935, at an annual rental of \$1.50. In this box she kept her
securities. The contract contained a printed form and provided for
the appointment of a "deputy" who in this case was
access to the safety deposit box. This form was
appointment of Mrs. Bradley as such deputy as
Mrs. Bradley and the
on engagement afterwards made on the contract that
of \$1.00 for the key given to Mrs. Bradley was return
key returned to the Company.
In 1935, Mrs. Bradley purchased a \$500 bond of the Chicago Bond and
\$1.00. The brokers delivered the bond to
inches wide. On the back is printed matter
date as, interest dates, amounts, maturity, names, etc.
in large letters near the center, the words "PROPERTY OF"
directly underneath there is a line where the owner's name
address may be written.
About the same time, Mrs. Bradley acquired from her aunt
Mrs. Bradley, a \$500 bond of the American Telephone & Telegraph
Company. It was placed with the other bond in the envelope
labeled by Bradley, Stewart & Co. The record above Mrs. Bradley
on various occasions, went with her aunt to the safety deposit
Company and that she never saw them except in the company of her
aunt. Upon the death of the latter, a number of her letters, in
which Mrs. Bradley, described at the time of her death, was
in the possession of the inheritance tax official, the earliest bond
company, in 1935, was not submitted regarding the document
and the fact that it was of great interest. When the bag was opened,
it was found to contain the letters of Mrs. Bradley and Mrs. Bradley
letters. The letters were not submitted and the letters were
by Mrs. Bradley, and should be in the possession of the
bond which was located in the inheritance.

With certain well understood exceptions, the law will never presume a gift inter vivos, and the burden of proving such a gift and its essential elements is upon the donee. (Bolton v. Bolton, 306 Ill. 473.) The bonds were negotiable instruments and subjects of a valid gift without endorsement or written assignment, if delivered to the donee with intent to transfer the title. (Rothwell v. Taylor, 303 Ill. 226.) They were, at one time, the property of the decedent. It was therefore the duty of Mrs. Bradley to establish by clear and convincing proof, the essential elements of a gift inter vivos. The essential facts are (1) the delivery of the securities by the donor to the donee, and (2) an intent to pass title from one to the other. (Bolton v. Bolton, supra; Rothwell v. Taylor, supra.)

The evidence in this case is not conflicting. In addition to the facts already recited concerning the relationship of the parties the joint access to the safety deposit box, and the individual purchases of bonds by the two women, the record discloses that Mrs. Bradley had written on the envelope furnished her by Halsey, Stuart & Co., in the appropriate blank, her name and address, "Mazie Bradley, 728 Addison Street". Sometime later she changed her residence and an ink line was drawn through the address on the envelope. Immediately underneath this line was written the new address, "1363 Greenleaf Ave." This change was made in the handwriting of the aunt. Mrs. Bradley again moved, and her aunt, in her own handwriting, endorsed on said envelope the latest address of her niece, "4876 Winthrop Ave." and immediately under those words she wrote "New Address". These personal acts of the aunt clearly indicate that she knew and recognized the Halsey, Stuart & Co. envelope and its contents were the property of her niece.

The physical condition of Mrs. Bradley was such as to refute any charge or imputation that she put in her envelope bonds belonging to her aunt. The key which had been given to Mrs. Bradley at the time the box was rented was undoubtedly surrendered because of her physical inability to go to the Safety Deposit Company alone and there was no good reason why she should not return

With certain well understood exceptions, the law will give
pressure a gift inter vivos, and the burden of showing such a gift
and its essential elements is upon
303 Ill. 453. The facts were undisputedly that the
of a valid gift without endorsement or delivery, it is
livered to the donee with intent to transfer the title. (Ill. 303 Ill. 453.) They were, at the same time, the necessity of
the beneficiary. It was therefore the duty of the. It is to be
tabular by clear and convincing proof, the essential elements of
a gift inter vivos. The essential facts are (1) the delivery of
the securities by the donor to the donee, and (2) an intent to
pass title from one to the other. (Ill. 303 Ill. 453.)
v. Taylor, supra.)
The evidence in this case is not conflicting. It establishes
the facts already recited concerning the relationship of the parties
the joint account to the party depositary, and the individual
purchase of bonds by the two women, the record reflects that first
Bradley had written on the envelope furnished her by Taylor, "Mrs.
is Co., in the apartment house, her name and address, "Mrs.
Bradley, 738 Madison Street." Sometime later she changed her
residence and an ink line was drawn through the address on the
envelope. Immediately afterwards this line was written the new
address, "1503 Greenleaf Ave." This change was made in the hand-
writing of the aunt. Mrs. Bradley again moved, and her aunt, in
her own handwriting, endorsed on said envelope the latest address
of her niece, "4000 Winthrop Ave." and immediately before those
words she wrote "Mrs. Bradley." These personal acts of the aunt
clearly indicate that she knew and recognized the identity, intent
of the envelope and its contents were the property of her niece.
The physical condition of Mrs. Bradley was such as to
necessitate any change or indication that she was in her envelope should
belonging to her aunt. The key which had been given to her.
Bradley at the time the box was mailed was undoubtedly understood
because of her physical inability to go to the post office and return
company alone and there was no good reason why she should not return

the key and get back the dollar which had been deposited for it. Every circumstance in evidence seems to show that the aunt, with a realization of the necessities of her niece, not only intended to pass title to the securities, but manifested that intention by an actual delivery thereof into the depository envelope of Mazie Bradley.

In this envelope there were also two slips of paper, each containing memoranda in the handwriting of the donor, Mary B. Moriarity. One is "Petitioner's Exhibit E". At the top of the slip appears the words "Mazie's Bonds" and under it is a list of bonds in most respects identical with the bonds in controversy. The same can be said of "Administrator's Exhibit O". There is some discrepancy between these two lists and the actual securities contained in the envelope. But the facts remain that the lists are in the handwriting of the decedent; that she marked them "Mazie's" and "Mazie's Bonds", and left them in Mrs. Bradley's envelope. Such circumstances are indicative both of an intention to pass title and of an actual delivery of the securities.

William Bradley, a son of the petitioner, aged 14 years testified in reference to a memorandum in the handwriting of his mother made on the back of a picture. He stated that about two years ago he had come home from school and found his mother and his Aunt Mary seated at a table. His aunt said "Magie, I want you to take a list of the bonds that I have given you that are in the box at the bank." Mary B. Moriarity then read off a list of bonds and Mrs. Bradley wrote the names and amounts on the back of the picture. When the list was completed, Mary B. Moriarity said "There is \$7500 in other bonds, and write down the name of the one that you bought."

Mildred Kouch, a sister of Mrs. Bradley, testified to three different conversations in which Mary B. Moriarity made declarations with respect to gifts of bonds to Mrs. Bradley. The last conversation was at the Wesley Hospital, the day before Mary B. Moriarity died. According to the testimony of Mrs. Kouch, Mary B. Moriarity stated that she was glad she had already given \$12,000 worth of bonds to Mrs. Bradley and she expressed a desire

the key and put back the dollar which had been returned for it. Every circumstance in witness seems to show that this man, with a realization of the importance of her mission, was very anxious to pass title to the securities, but manifested a lack of confidence in an actual delivery thereof into the hands of the defendant.

In this envelope there were also two slips of paper, each containing a reference to the handwriting on the bond, Mary B. Moriarity. One is "Testimony of William B. Moriarity" and the other is a list of slips appearing the words "Moriarity's Bonds" and under it is a list of bonds in most respects identical with the bonds in controversy. The same can be said of "Administrators' Bonds". There is some discrepancy between these two lists and the normal securities contained in the envelope. But the facts remain that the lists are in the handwriting of the decedent; that one mentioned "Moriarity's Bonds" and "Moriarity's Bonds", and left them in the envelope. Such circumstances are indicative of an intention to pass title and of an actual delivery of the securities. William Moriarity, a son of the decedent, died in 1911. He testified in reference to a memorandum in the handwriting of his mother made on the back of a check. He stated that about two years ago he had seen some from school and from his mother and his aunt Mary, seated at a table. He said that I want you to take a list of the bonds which I have given you that are in the box at the bank." Mary B. Moriarity then read off a list of bonds and Mrs. Moriarity wrote the names and amounts of the bonds on the check. She then said that she had given the check to the bank. She said that there is \$7500 in other bonds, and while now the name of the one that you bought."

William Moriarity, a sister of Mrs. Moriarity, testified to three different conversations in which Mary B. Moriarity made the statements with respect to gifts of bonds to Mrs. Moriarity. The last conversation was at the Casey Hospital. The day before Mary B. Moriarity stated that she was ill and that she had already given \$75,000 worth of bonds to Mrs. Moriarity and she expressed a desire

to see her own sister, Mrs. Moxley, about making a will to dispose of the remainder of her property. Mrs. Moxley was sent for, but before she arrived at the hospital, Mary B. Moriarity had taken a turn for the worse and was unable to transact any business.

Two or three other witnesses testified to similar conversations and admissions. The administrator offered no evidence to contradict any of petitioner's witnesses, and we observe nothing in the record to discredit their testimony. A review of the record impels us to the belief that the securities found in Mrs. Bradley's envelope were her individual property and that the bonds in controversy were actually delivered to her by Mary B. Moriarity as a gift and with the intention of passing title from Mary B. Moriarity to Mazie Bradley. These facts appear to us to have been shown with the degree of conclusiveness required by law. The judgment and order of the circuit court is therefore affirmed.

~~Judgment~~ affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 L.A. 685⁴

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 6 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

WILLIAM L. KNIPPEL, Administrator
of the Estate of RAYMOND J. KNIPPEL,
DECEASED,

Appellee

-VS-

ELGIN, JOLIET & EASTERN RAILWAY
COMPANY,

Appellant

Appeal from the Circuit
Court of Will County.

OCTOBER TERM, 1929.

Jett, P. J.

William ~~A.~~ Knippel, Administrator of the estate of Raymond J. Knippel, deceased, appellee, instituted this proceeding in the Circuit Court of Will County, against Elgin, Joliet and Eastern Railway Company, appellant, to recover damages on account of the death of Raymond J. Knippel, occasioned by the alleged negligence of the appellant.

A jury trial was had resulting in a finding in favor of appellee and against the appellant, and assessing the damages at \$1750.00; motions for a new trial and in arrest of judgment were made argued, denied and the appellant prosecutes this appeal.

The declaration consists of three counts. The gist of the first count is that the appellant negligently operated and propelled its switch engine in an easterly direction on June 29, 1927, through the Village of Matteson, in Cook County, and that appellee's intestate was injured and killed as a result of a collision with the engine at the time and ~~in~~ place stated, while appellee's intestate, exercising due care for his own safety, was driving and operating a motor truck on the public highway that crosses the tracks of appellant. In the second it is averred that the appellant, negligently omitted to ring a bell or sound a whistle within at least eighty rods from the place of the collision, and that the appellee's intestate was injured and killed as the approximate result thereof. The third

charges that the appellant negligently omitted to remove a group of willow trees on its right of way, west of the public highway along which appellee's intestate was proceeding, and as a result thereof appellee's intestate was unable to see the approaching engine and was injured and killed in the collision. Each count of the declaration avers that the deceased left surviving him his father, mother and brother as his next of kin, and that his father and mother are deprived of pecuniary assistance by reason of the death of the deceased. A number of reasons are assigned for a reversal of the judgment.

The record discloses that the right of way of the Elgin, Joliet and Eastern Railway Company, as it intersects Crawford Avenue, on which the collision in question occurred, to the west thereof, curved in a southwesterly direction; three hundred and fifty feet west of Crawford Avenue at a point where the railroad tracks curve in a southwesterly direction, there is located on the north side of said Elgin, Joliet and Eastern Railroad right of way, some willow trees with a large number of branches; said trees being in the neighborhood of forty feet in height, and having a spread of between forty-five and fifty feet, extending over the right of way for a distance of twenty feet, and into the telegraph line located thereon. One Hundred and forty seven feet north of the tracks on the west side of Crawford Avenue there is located a stop sign, six feet in height, and having a disk of 18 inches in diameter. It appears that the decedent, as he proceeded south on Crawford Avenue stopped at the stop sign, then proceeded on to the tracks where the collision took place, at which time and place he met his death.

There is evidence that the switch engine was running at a high rate of speed and did not sound a bell or whistle prior to the collision, and did not slacken its speed up to the time of the impact. The truck was thrown fifty feet and the engine came to a stop six hundred feet east of Crawford Avenue.

Two principal grounds are relied on for a reversal of the judgment. The first of which is that the court erred in refusing to direct a verdict in favor of the appellant at the close of the

evidence, on the part of appellee, and again at the close of all the evidence.

We have investigated the record in this cause. The evidence of appellee, and taken as true with all the reasonable inferences to be drawn therefrom, fairly tended to prove the charge as laid in the declaration.

A peremptory instruction for the defendant should not be given where the evidence introduced on behalf of the plaintiff when taken to be true, together with all legitimate inferences that may be drawn therefrom in favor of the plaintiff, tends to support the cause of action set out in the declaration or any count thereof. *Mirich vs. Forscher Contracting Co.* 312 Ill. 343; *Libby, McNeil & Libby vs. Cook* 222 Ill. 206-211.

In *Mirich vs. Forscher Contracting Company Supra*, the court at pages 355-356 used the following language:- "It must, we think, be accepted as settled law that a trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove the facts. The decisions are numerous, and are uniform, that the trial judge is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action. When a motion is made to direct a verdict it is not the province of the trial court to weigh and determine the preponderance of the testimony. This court has held in many cases that such a motion raises a question of law, and the function of the trial court is limited strictly to determining whether there is or is not evidence legally tending to prove the fact alleged. If there is such evidence the case must be submitted to the jury even though the greater weight of the evidence may seem to the court to be on the side of the other party. It has always been recognized that for a trial court to weigh and determine conflicting evidence and direct the jury what verdict to render would be a direct violation of the constitutional right of trial by jury."

The verdict of a jury will not be lightly disturbed and will not be set aside where the evidence is conflicting even

reference, on the part of ourselves, and upon it the state of all the

and the manner in which it was

and in the decision.

It is necessary to consider for the decision whether or not

given where the evidence introduced is in the nature of a

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though it may seem to be against the weight of the evidence unless it is apparent the jury have been actuated by passion or prejudice. C. B. & Q. R. R. Co. vs. Lee, Administrator, 87 Ill. 454; Rock Island vs. Deis, 38 Ill. App. 409.

The second ground urged by the appellant is that the court erred in denying appellant's motion for a new trial. In this connection the argument is principally directed to the assignment of error, that the verdict is against the manifest weight of the evidence, it being insisted on the part of the appellant that if the appellee's intestate had looked he could have seen appellant's engine in ample time to have avoided the collision and therefore he was guilty of contributory negligence which would bar recovery by appellee.

The record discloses, that on the charge of negligence, appellee offered testimony tending to the effect that no bell was rung or whistle sounded as the engine in question approached the crossing. Appellant offered the testimony of the engineer and fireman and other witnesses to the effect that the bell was rung and the whistle was sounded. Appellee offered evidence with reference to the willow trees in question growing upon or near the right of way of appellant company, and obstructing the view of one of the highway in question. The evidence as to the location of the trees is conflicting but it is uncontradicted that their branches extended over into the right of way. It being the contention of appellee that the trees and the branches thereof tended to obstruct the view of a person approaching the right of way as appellee's intestate was doing just prior to the collision that resulted in his death.

A failure to stop look or listen, or to do any particular act before crossing a railroad track is not contributory negligence as a matter of law, but whether the conduct of the plaintiff constitutes negligence is a question of fact for the jury to determine under all of the circumstances in view of all his surroundings. The plaintiff is under no duty to anticipate negligence in others, but

though it may seem to be against the weight of the evidence unless it is apparent the jury have been misled by question or evidence. O. N. & C. R. N. Co. vs. Lee, Administration, 57 Ill. 184; Cook v. Island vs. Lee, 58 Ill. 187. 189.

The second ground urged by the appellant is that the court erred in denying appellant's motion for a new trial. In this connection the argument is principally directed to the assignment of error, that the verdict is against the weight of the evidence, it being insisted on the part of the appellant that if the appellee's intestate had looked he could have seen appellant's engine in ample time to have avoided the collision and therefore he was guilty of contributory negligence which would bar recovery by appellee.

The record discloses, that on the charge of negligence, appellee offered testimony tending to the effect that no bell was rung or whistle sounded as the engine in question approached the crossing. Appellant offered the testimony of the engineer and fireman and other witnesses to the effect that the bell was rung and the whistle was sounded. Appellee offered evidence with reference to the willow trees in question growing upon or near the right of way of appellant company, and obstructing the view of one of the highway in question. The evidence as to the location of the trees is conflicting but it is undisputed that their branches extended over into the right of way. In doing the contention of appellee that the trees and the branches thereof tended to obstruct the view approaching the right of way as appellee's intestate prior to the collision that resulted in his death.

A failure to stop look or listen, or to do any other thing not before crossing a railroad track is not contributory negligence as a matter of law, but whether the conduct of the plaintiff constitutes negligence is a question of fact for the jury to determine under all of the circumstances in view of all his surroundings. The plaintiff is under no duty to anticipate negligence in others, but

he has a right to rely on the known duty of the defendant. Moore vs. Hines 221 Ill. App. 589-594; Pienta vs. Chicago City Railway Company 284 Ill. 246-251.

It is undisputed that ~~the~~ the deceased stopped at the stop signal 147 feet from the crossing. The decedent stopping at the stop sign, had a right to believe and rely upon the expectation that the employees of appellant would perform their statutory duties by the ringing of a bell or sounding a whistle at the crossing. There is really no definite rule laid down in the books where a person is to stop approaching a railroad crossing and make an observation with reference to the approaching of trains.

In addition to the statutory duty of railroads, the common law imposes a duty on them to use reasonable care in the management of trains approaching dangerous crossings. The speed of a train at a particular crossing under all of the circumstances may be negligence, even though the stop signals are given, and signals other than the statutory signals may be required in the exercise of ordinary care.

In Elgin, Joliet and Eastern Railway Company vs. Lawlor, 229 Ill. page 629, the court among other things said:- "Aside from the requirements of the statute, persons handling trains approaching crossings are required to use reasonable care, and what is such degree of care, is a question of fact depending upon the local conditions. One of the numerous conditions which would be material for the consideration of the jury would be the extent to which the crossing is used." The crossing in question was one over which evidently there was much traffic. The engine was certainly running at a high rate of speed. The truck was thrown 50 feet.

In view of the state of the record we are not prepared to say that on the question of negligence of the appellant and of the due care of appellee's intestate that the verdict is against the manifest weight of the evidence.

has a right to rely on the duty of the defendant.

Trinity Company 284 Ill. 243-244.

It is understood that the deceased was at the time

about 125 feet from the crossing. The deceased, according to

the report, had a right to believe and with good reason

believe that the engineer of the train would stop before

reaching the crossing by the ringing of a bell or sounding a whistle

at the crossing. There is really no definite rule laid down

in the books where a person is to stop approaching a crossing

crossing and who an observation with reference to the up crossing

of crossing.

In addition to the statutory duty of the engineer, the engine

law requires a bell on them to be rung in case of

train as a precaution crossing under all of the circumstances

may be negligence, even though the stop signals are

signals other than the statutory signals may be required in the

from the requirements of the statute, persons handling trains

approaching crossing are required to use reasonable care, and

that is much degree of care, in a question of that depending

upon the local conditions. One of the numerous conditions which

would be material for the consideration of the jury would be

the extent to which the crossing is used. The crossing in

question was one over which evidently there was much traffic.

The engine was certainly running at a high rate of speed. The

train was thrown 30 feet.

In view of the state of the record we are not prepared

to say that on the question of negligence of the defendant and

of the duty of the engineer's testimony that the verdict is

- Moreover, it appears that at the conclusion of all of the evidence it was agreed between counsel for appellee and appellant that the jury might view the premises and the scene of the accident. The purpose of this evidently was to enable the jury to better understand the matters in controversy and view the track where it intersected Crawford Avenue, the willow trees claimed by appellee to have obstructed the view, and whether they were on the right of way of appellant. What the jury saw and observed could not be made a matter of record. This fact however, is of some importance and is proper, we think, to be taken into consideration in determining the weight of the evidence especially bearing upon the question as to whether the obstruction was responsible for the accident.

In Stearns on Real Actions 102, in speaking of the practice and allowing view by jury it is said:- "The design of this proceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions for an injury to the realty, trespass, quare clausum fregit, trespass on the case and nuisance." This quotation is referred to and cited in Vane et al vs. City of Evanston 150 Ill. 316-323. The respective parties must have had some purpose in mind in allowing the jury to view the crossing where the collision occurred. We can not imagine there was any reason other than that it would give the jury a better understanding of the evidence. Other/ errors were assigned but not argued and were thereby waived.

We conclude therefore that the judgment of the Circuit Court of Will county should be affirmed which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

}
ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

10/17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2531A.625⁵

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 6 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of
Illinois,
Second District.
May Term, A.D. 1930.

Isaac Bork,

appellee,

vs.

Oscar E. Hokin,

appellant,

Appeal from the Circuit Court
of Peoria County.

OPINION by BOGGS, J.

Appellee filed a bill in the circuit court of Peoria County against appellant, praying that he be enjoined from engaging in the junk business in the city of Peoria and its environs for a period of five years from November 13, 1928. A temporary injunction was granted, which, on motion, was thereafter dissolved. An answer was filed to said bill, and the cause was referred to the master in chancery to take the evidence and to report the same to the court, with his conclusions of law and fact thereon. The master took and reported the evidence, with his conclusions, and recommended a decree for injunction as prayed. Exceptions were filed to said report by appellant, which for the most part were overruled, and a decree was entered for an injunction as prayed. To reverse said decree, this appeal is prosecuted.

No question is raised by either of the parties with reference to the pleadings, so it will not be necessary to set forth the same in this opinion.

The record discloses that on April 22, 1926, appellee owned certain real estate in Peoria, Illinois, on which he operated a junk business; that on said date he sold said business to one

Jacob Manfield for \$28,000. Manfield took possession of said business, and associated with him therein appellant, a son in law, and Arthur L. Manfield, a son, conducting said business as J. Manfield & Sons.

In the summer of 1928, appellee began negotiations with Manfield for the repurchase of said business. On October 13, 1928, a contract was executed for the sale of said business to appellee for \$34,000, with a covenant on the part of Manfield not to re-enter the junk business for a period of five years in the city of Peoria and its environs, and that he would secure the written agreement of his wife, appellant and Arthur Manfield to the same effect. On November 13, 1928, appellee, Manfield, appellant and Arthur Manfield met for the closing of said contract. At that time appellant had gone into the junk business in said city, under the name of Acme Iron & Metal Co. Appellee insisted that before the deal should be closed and the money paid over by him, appellant and Arthur Manfield must sign an agreement not to engage in the junk business as above set forth. Appellant at first refused to sign such agreement, but finally, after taking legal advice, signed the instrument, together with the wife and son of the said Jacob Manfield, said agreement being as follows:

"In consideration of Isaac Bork purchasing the property and business of Jacob Manfield and Jacob Manfield & Sons, as provided in the foregoing agreement, and other good and valuable considerations to each of us paid, receipt of which is hereby acknowledged, the undersigned, we and each of us do hereby jointly and severally agree, that we will not, either singly or together, directly or indirectly, through any other person or concern, nor in any manner whatsoever, engage in the metal, paper, rag or junk business in any of its branches in the City of Peoria, Illinois, nor in East Peoria, Illinois, or Bartonville, Illinois, for a period of five years from the date hereof; and the undersigned further agree in consideration of the premises, to sign acknowledge and deliver the deed and the bill of sale mentioned and referred to in the foregoing agreement

In the opinion of the court

affirmed

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Jacob Manfield for \$28,000. Manfield took possession of said business, and associated with him therein appellant, a son in law, and Arthur L. Manfield, a son, conducting said business as J. Manfield & Sons.

In the summer of 1928, appellee began negotiations with Manfield for the repurchase of said business. On October 13, 1928, a contract was executed for the sale of said business to appellee for \$34,000, with a covenant on the part of Manfield not to re-enter the junk business for a period of five years in the city of Peoria and its environs, and that he would secure the written agreement of his wife, appellant and Arthur Manfield to the same effect. On November 13, 1928, appellee, Manfield, appellant and Arthur Manfield met for the closing of said contract. At that time appellant had gone into the junk business in said city, under the name of Acme Iron & Metal Co. Appellee insisted that before the deal should be closed and the money paid over by him, appellant and Arthur Manfield must sign an agreement not to engage in the junk business as above set forth. Appellant at first refused to sign such agreement, but finally, after taking legal advice, signed the instrument, together with the wife and son of the said Jacob Manfield, said agreement being as follows:

"In consideration of Isaac Bork purchasing the property and business of Jacob Manfield and Jacob Manfield & Sons, as provided in the foregoing agreement, and other good and valuable considerations to each of us paid, receipt of which is hereby acknowledged, the undersigned, we and each of us do hereby jointly and severally agree, that we will not, either singly or together, directly or indirectly, through any other person or concern, nor in any manner whatsoever, engage in the metal, paper, rag or junk business in any of its branches in the City of Peoria, Illinois, nor in East Peoria, Illinois, or Bartonville, Illinois, for a period of five years from the date hereof; and the undersigned further agree in consideration of the premises, to sign acknowledge and deliver the deed and the bill of sale mentioned and referred to in the foregoing agreement

as therein provided."

Upon the signing of said agreement, appellee paid the consideration to be paid by him, and said transaction was closed. Appellant thereafter engaged in the junk business, and the bill in this case was filed as above set forth, to restrain him from so doing.

It is first insisted by counsel for appellant that the evidence fails to show that appellant received any consideration for the signing of said agreement.

It has been repeatedly held in this state that it is not indispensable that the consideration shall pass directly to the promisor, but any act which is a benefit to one party or a disadvantage to the other, constitutes a sufficient consideration to support a contract. *Buchanan v. International Bank*, 78 Ill. 500-505; *People v. Commercial Ins. Co.*, 247 Ill. 92-98; *Schlatter v. Triebel*, 284 Ill. 412-415; *Milby v. Mowery*, 125 App. 417-420; *Dickinson v. McKay*, 177 App. 412-416.

"Every sufficient consideration, although not technically an estoppel, contains the substantial elements of an estoppel in pais, since one man by his promise induces another to change his situation and to repudiate his promise would enable him to perpetrate a fraud." 13 C. J. 318.

The record discloses that appellee refused to consummate said transaction until the execution of the foregoing agreement by appellant and Arthur Manfield. Under the holding of the foregoing authorities, even though appellant may not have received any part of the purchase price, appellee having parted with the same on the strength of appellant's agreement not to enter such business, it was sufficient to support said contract on the part of appellant.

It is next insisted that, even though a consideration passed to appellant for the signing of said agreement, it was not sufficient to warrant a decree of injunction to restrain a violation of the same.

What we have already said in connection with the first

proposition made by appellant, sufficiently disposed of this contention. It is not necessary that any actual benefit shall pass to the promisor, provided the promisee would suffer by reason of the failure of the promisor to carry out his part of the agreement. It is practically conceded that appellee would not have consummated said contract, but for the execution of said agreement by appellant and Arthur L. Manfield. The consideration, therefore, was not merely technical, but was substantial.

"Courts will not enquire whether the consideration was adequate or equal in value to that which the party loses by the restraint." *Lynn v. Sigsbee*, 67 Ill. 75-80; *Hursen v. Gavin*, 162 Ill. 377-380.

It is next contended by appellant that he had no financial interest in said business, but was merely an employee of Jacob Manfield, and that therefore his agreement not to enter into said junk business "is invalid and unenforceable as against public policy."

While the evidence is conflicting as to whether or not appellant was in fact a partner in said business, the master and the court found that he was a partner, and this finding is supported by the evidence. Whether or not he was an actual partner, the evidence is to the effect that he had held himself out as such, and he is not in a position at this time to insist that he was not a partner in said business, so far as appellee is concerned. But, if it be conceded that he was not a partner, he, according to his own testimony, signed said agreement for the reason that appellee would not pay the consideration and close said contract unless he did so. Under the foregoing authorities, this would be sufficient to bind appellant to the extent that a writ of injunction would lie against him if he violated said agreement.

One of the arguments made by appellant in this connection is that contracts in restraint of trade are held to be illegal and unenforceable unless it is made to appear that they are fair and reasonable.

Contracts in partial restraint of trade, of the character here involved, are held to be valid and enforceable. 13 C. J. 467-472. A contract or agreement not to transact business at specified places, or with particular persons within reasonable bounds, is valid and enforceable. Hoops Tea Co. v. Dorsey, 99 App. 181-184; Lynn v. Sigsbee, supra, 80; Moore v. Bennett, 41 App. 164-173; Hursen v. Gavin, 59 App. 66-69; Hursen v. Gavin, 162 Ill. 377-380; Darnell v. Geis, 78 App. 498; Cahill v. Madison, 94 App. 216-220.

Where the restriction of a negative covenant is partial, reasonable, and calculated to foster the business of the covenantee, rather than to destroy competition, it is not against public policy. American S. & G. Co. v. Chicago, G. Co., 184 App. 509-518; Southern Firebrick & Clay Co. v. Garden City Sand Co., 223 App. 616-622; Hursen v. Gavin, 162 Ill. 377. In the latter case, the court, in referring to the contract there under consideration, at page 382 says:

"It was only in partial restraint of trade. It was limited in time for the period of five years, and in space to the city of Chicago. * * * The limitation here did not go beyond what was necessary for the protection of appellee in the prosecution of the business purchased by him, and was therefore reasonable. "

To the same effect is Boyce v. Watson, 52 App. 361. In Rugg v. Rohrbach, 110 App. 532, the court, in considering a contract of this character, at page 535 says:

"That the restrictive covenant of appellee that he would not engage in the same or a similar business in Chicago for three years was an important and controlling inducement to the making of the purchase by appellant."

Under the foregoing authorities, it cannot be held that the contract here sought to be enforced, being only in partial restraint of trade, was unreasonable or unenforceable. It is of the character which the courts are uniformly enforcing.

It is next contended that there must be a main purpose, to which the contract in restraint of trade is ancillary, and that that main purpose must be between the parties, and that such main purpose did not exist in this case.

What we have already said sufficiently disposes of this contention. The main purpose for the execution of the contract here sought to be enforced, was the protection of appellee from injury resulting from appellant or the other persons who executed said contract, entering into business in competition against appellee for the period of five years.

It is next contended by appellant that the court erred in refusing to continue said cause, on the ground that Victor P. Michel, one of the counsel for appellant, was a senator in the legislature, which was in session on March 11, 1929.

While the affidavit in support of the motion for continuance was probably sufficient to warrant the granting of said motion, the record ~~discloses~~ that no serious prejudice resulted to appellant from the denial thereof. Said attorney in his affidavit stated that he was to do the examining and cross examining of the witnesses, and had prepared himself for that purpose. The record discloses that this case was not close on the facts, and the findings of the master and the decree of the court on the facts were fully warranted by the evidence. We would therefore not be warranted in reversing said decree on account of the refusal of the court to grant said motion.

Finding no reversible error in the record, the decree of the trial court will be affirmed.

Decree affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

102 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 I. C. 6261

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MAX BRILL,	:	
	:	
Appellee,	:	Appeal from the
	:	
vs.	:	Circuit Court of
	:	
SAMUEL SANDLER,	:	Peoria, County.
	:	
Appellant	:	

JOHN J:

This cause has been tried before a Justice of the Peace and also in the Circuit Court. In both courts, the plaintiff recovered a judgment for \$237.50 and costs. The suit is for the recovery of commissions claimed to be due the plaintiff for aiding in the purchase of a stock of shoes.

The plaintiff, Max Brill, for a number of years had been engaged in the retail shoe business. The defendant, Samuel Sandler, had also been engaged in that business. The men had known each other for about seven years. Brill went out of the shoe business and was running a filling-station in Peoria. Sandler continued in the shoe business

In July, 1928, Sandler came to the ~~filling-station~~ of Brill and according to Brill's testimony, Sandler said, "I am incorporated now, and I am selling stocks and anything you get I will pay you well." Brill said, "How much?" and Sandler replied, "Five per cent." Thereafter the parties went together to look at several stocks of shoes in Peoria which were for sale and also to see some in Trenton and in other places in the vicinity of Peoria. None of these stocks of shoes were purchased.

Brill further testified that during the same month, he learned, through a friend of his, that there was a stock of shoes for sale at Lincoln, Illinois. He called Sandler by phone and gave him that information. It was agreed between the parties that they would go to Lincoln the next day ~~and~~ to inspect the stock. In pursuance of that agreement, Sandler sent his car the next

Abstract

morning to the filling-station for Brill. The two men then went to Lincoln, where they called upon Mr. Kuhl, President of the Lincoln National Bank, which had a large claim against the stock of shoes. Mr. Kuhl advised them that the stock was in the hands of Mr. Dean J. Harris, as trustee. The parties then went to look at the shoes, but the stock was being rearranged and they were not permitted to inspect it. They agreed to return to Lincoln the following Monday. Brill further testified that Sandler did not wait until the following Monday to return to Lincoln, but went on the Saturday before, and purchased the stock for \$4,750, without the knowledge of plaintiff.

Sandler denied ever employing Brill or engaging him to assist in the purchase of any stock of merchandise. He denied that Brill gave him the information relative to the stock of goods at Lincoln, and claimed he had known the stock was for sale several weeks before he and Brill went to see it. He testified that his only reason for taking Brill to Lincoln was that the latter requested him to do it. He admitted he bought the stock of goods for \$4,750, but claimed he acted for the B. & B. Shoe Company, a corporation. It is his contention, first, that Brill was not employed as an agent to assist in purchasing any stock of goods, and, second, that if he were so employed, it was by the B. & B. Shoe Company, and the suit should have been brought against it.

Two juries have passed upon the facts involved in this case and both of them have given credit to the testimony of the plaintiff rather than to the testimony of the defendant. An examination of the record leads us to the belief that the defendant did engaged the plaintiff to assist in the purchase of stocks of shoes and agreed upon a commission of five per cent. If Sandler was acting for himself in employing Brill, or if he failed to disclose his agency, then he is personally liable for the commission promised to be paid.

It is true that Sandler said to Brill, "I am incorporated now.", but there is no other proof in the record that the B. & B. Shoe Company was a corporation, or that it

was not merely a trade name under which Sandler was doing business. He was asked a number of questions concerning the identity of the real purchaser, but his answers are evasive. He testified that the B. B. Shoe Company became the owner of the stock of goods through a sale made by the trustee Harris and that he was the general manager of the company. At one time he testified that he owned no stock in it and again he testified that he owned a little stock. He further testified that at the time of the trial the company had gone out of business. Under the facts and circumstances shown, we are not at liberty to disturb the judgment. A court of review is not warranted in reversing a judgment upon the facts, unless it is clear that the verdict is not supported by the evidence. (Radclyff v. Hanger, 259 Ill. App. 292.)

Appellant complains of the court's refusal to give Instruction No. 2 tendered by him. The substance of this instruction is contained in the first given instruction for the defendant, and there was therefore no error in refusing Instruction No. 2. Moreover, the correctness of the court's action, in refusing to give such instruction, was not challenged in the written motion for a new trial.

The record being free from reversible error, the judgment of the circuit court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty _____

Clerk of the Appellate Court

103
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2581A. 626²

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

HAROLD F. SHANNON,	:	
	:	
Appellee,	:	
	:	
vs.	:	
	:	
ROBERT SHORT,	:	
	:	
Appellant,	:	

JAMES J:

Harold F. Shannon recovered a verdict and judgment for \$384.75 against Robert Short in an action for damages to Shannon's automobile. Both parties were driving south on what is known as North Second Street, a road running between Beloit, Wisconsin, and Rockford, Illinois. The road is improved with a tarvia surface about 30 feet wide, having wings or shoulders of mixed clay and gravel.

As the cars proceeded south, Shannon was trailing Short. The evidence tends to show that neither car travelled at a rate of speed greater than 25 miles an hour. The thermometer stood around zero and both cars were closed. Short, who was accompanied by his wife, was going to the home of a sister-in-law, Mrs. Shultz, who lived on the east side of the above mentioned road. Along the east side of the road was a ditch. Over this ditch and forming a part of the driveway into the Shultz property, was a bridge. When Short arrived at a point where he should turn to the left and pass over this bridge, he turned without giving any warning signal. The evidence also tends to show that before making the turn, he slowed down somewhat.

Just about the time Short reduced the speed of his car, Shannon sounded his horn as a signal that he intended to pass. Also immediately, Shannon observed that the Short car was ~~turning~~ turning to the left. By this time the two cars were alongside of each other. Shannon and a witness, ~~W.~~ ^{W.}

McDonnament, testified the Short car continued to turn toward the left and that Shannon undertook to go into the driveway but was unable to do so and his car ran into a ditch and against an embankment where it was damaged.

The defendant, Short, admits he gave no sign of his intention to turn to the left. The Statute provides that no driver of a vehicle shall suddenly stop, slow down, or attempt to turn around, without first signalling his intentions with outstretched arm or otherwise to those following closely in the rear. (Sub-Sec. 4, Main Sec. 38, Para. 254, Chap. 121, Revised Statutes.) It is obligatory upon drivers of automobiles to observe the law of the road, and when one ignores or violates it, and an accident results thereby, he has been guilty of contributory negligence which bars any recovery from the other party for resulting damages. In the interest of safety, this rule cannot be too strongly emphasized and vigorously enforced. (McCarthy v. Egan, 256 Ill. App. 500.)

The defendant, however, insists that notwithstanding his own negligence, the plaintiff was guilty of contributory negligence and this raises the only question in the case. He argues that he was near the center of the road; that he attempted to slow down; and that his intention to turn to the left ought to have been apparent to the plaintiff. Contributory negligence is ordinarily a question of fact and the jury in this case was entitled to find that the plaintiff was not guilty of any negligence which contributed to the injury. It is difficult for us to see how a mere change of speed would warn an approaching car of the driver's intention to turn to the left. It is obvious that it would no more indicate a determination to turn to the left than it would to the right, or to go forward at the changed rate of speed, or indeed to come to a full stop. In any such case it was his duty to warn the driver close behind him.

The law gives the right to the approaching car to pass a car ahead of it upon the left. The evidence in the

case is that Shannon, the driver of the approaching car, sounded the horn twice and that in spite of the warning, the plaintiff continued in his course toward the left, forcing Shannon into the ditch. Under such evidence the plaintiff cannot be held to be guilty of contributory negligence.

In order to prove the amount of plaintiff's damages, J. A. Anderson, a garage man, was called as a witness. He testified he made the necessary repairs upon Shannon's car. After detailing their nature, he was asked what was the reasonable and customary price for the repairs and parts. He answered, "I can tell by referring to the sheets. It was \$20.78." This answer was excluded and the witness was again interrogated as to certain sheets produced by him, and he stated he prepared them and that they showed the actual cost or actual price of the several items which went into the bill and were correct. The sheets were then admitted in evidence, with the exception of an item of \$1.00 for alcohol which was excluded not to be a proper charge. The witness further testified that the charge of \$5.26 was a usual and customary charge.

The sheets were copies of the original entries. The objection made to their admission in evidence was general and did not specify its grounds. If it was based upon the fact that the sheets were not the original entries, it could have been cured by the production of the originals. It is the duty of the objector to state the grounds of his objection and his failure to do so, in ~~any~~ apt way, forbids him to urge such objection here. (Grand Pass Shooting Club v. Grosby, 181 Ill. 266; Wyman v. City of Chicago, 254 Ill. 202.)

Complaint is made of the giving of plaintiff's instructions 1 and 5. A reading of these instructions will disclose that they are in harmony with the principles of law expressed in this opinion and were properly given. Plaintiff's instruction 4 is a correct statement of law and was also properly given.

Defendant's instruction 5 is not only argumentative

but instructions already given by the court in the case of negligence. While a driver of a car is not bound to know that cars are travelling in the same direction, still, he is bound to know that they may do it, and the mere passing of an approaching car is not to be considered either "unusual" or "extraordinary" as stated in the instruction. There was no error occasioned by the court's refusal to give defendant's instruction 6. The instructions, when taken as a whole, sufficiently charged the jury as to the duties of the respective drivers.

The parties agree that the bill for repairs in this case contains a duplication of an item of \$48.00. Therefore there should be a credit entered by the plaintiff in that amount. Upon such a credit being entered in this Court, the judgment will stand affirmed in the sum of \$291.70.

Dismissed upon Remittitur.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

104-7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2581A. 626³

BE IT REMEMBERED, that afterwards, to-wit: On
1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE PEOPLE OF THE
STATE OF ILLINOIS,

Defendant in error

-VS-

HARRY A. TERHUNE

Plaintiff in error

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ERROR TO THE CIRCUIT COURT
OF WHITESIDE COUNTY.

Jett, J. J.

The grand jury in and for the county of Whiteside returned an indictment against Harry A. Terhune, the plaintiff in error, consisting of three counts.

The first count charges the plaintiff in error with obtaining property by means of the confidence game.

The second count charges that the plaintiff in error unlawfully, wilfully, fraudulently and feloniously with intent to defraud, did make and deliver a check being an order for the payment of money upon a bank and did thereby, then and there, obtain property from Robert W. Miller, doing business as the Miller Motor Company to wit: Personal property, one automobile, of the value of One thousand four hundred (\$1,400.00) dollars, the said Harry A. Terhune also then and there known as H. A. Terhune, then and there knowing at the time of making and delivering such check that he, the maker, did not have sufficient funds in or credit with such bank for the payment of such check in full upon its presentation which said check is in the words and figures following to wit:

H. A. TERHUNE

Chrysler Motor Cars

STERLING ILL., 4/7 1928 No. 135758

Pay to the
order of

MILLER MOTOR CO.

1355.00

Thirteen Hundred Fifty Five - - - - - Dollars.

To The First National Bank

Rock Falls, Illinois

H. A. Terhune.

In the third, it is charged that the plaintiff in error unlawfully, wilfully, fraudulently and feloniously with intent to defraud, did draw and utter a check being an order for the payment of money upon a bank and did thereby, then and there, obtain property from Robert E. Miller, doing business as the Miller Motor Company, to-wit: personal property, one automobile of the value of One thousand and four hundred (\$1,400.00) dollars, the said Harry A. Terhune also known as H. A. Terhune then and there knowing at the time of drawing and uttering such check that he, the maker, did not have sufficient funds in or credit with such bank for the payment of such check in full upon its presentation, which said ~~check~~ check is in the words and figures following to-wit: The check being as above set out in the second count/.

A motion was made by the plaintiff in error to quash the indictment and each count thereof which was overruled. The first count of the indictment was nollied by the States Attorney. To the second and third counts of the indictment plaintiff in error entered a plea of not guilty.

A jury trial was had resulting in finding the plaintiff in error guilty in manner and form as charged in the second and third counts of the indictment.

A motion in arrest of judgment was made, denied and the court thereupon rendered a judgment upon the verdict of the jury. The plaintiff in error was sentenced to the county jail of Whiteside County for a period of six months and he prosecutes this writ of error.

It is first urged that the court erred in refusing to quash the indictment. The second and third counts of the indictment are in the language of the statute and in addition thereto the pleader set out in the indictment the check in question. The law is that if an indictment or information is so specific that the defendant is notified of the charge that he is to meet and is able to prepare his defence and the nature of the charge can be easily understood by the court or jury the indictment or information

In the third, it is alleged that the plaintiff in error
unlawfully, willfully, fraudulently and unlawfully caused to
be made, and that under a checkbook no order was made
of money upon a bank and his account, then and there, which was
only for the purpose of making a checkbook and other things
to be made, and that the plaintiff in error, the said
the plaintiff and John, received \$1,400.00 (one thousand four hundred
and no/100ths) dollars. It is further alleged that the plaintiff in error
time of making and receiving such a checkbook, the plaintiff in error
have sufficient funds in an account with such bank for the payment
of such check in full when the check was made, which said check
is in the hands and figures following to-wit: the check being as
above set out in the second account.

A motion was made by the plaintiff in error to have
the indictment and each count thereof which was returned in the
first county and indictment was filed in the first
in the second and third counts of the indictment which in error
entered a plea of not guilty.

It is further alleged that the plaintiff in error, the said
in error, which in error and there as charged in the second and
third counts of the indictment.

A motion in error of the plaintiff in error, to have the
the court thereupon returned a judgment upon the verdict of the
jury. The plaintiff in error has moved to have the court set
aside the verdict for a verdict of acquittal and to have the
verdict of error.

It is further alleged that the plaintiff in error, the said
which the indictment. It is further alleged that the plaintiff in error
and in the language of the statute and in addition between the
pleader set out in the indictment the check in question. The law
is that if an indictment or information is so defective that the
defendant is notified of the charge that he is so that he can be
to prepare his defense and the nature of the charge can be easily
understood by the court or jury and the indictment or information

is sufficient. (People vs. Westerdahl 316 Ill, 86-90) It will be observed that the ~~statu~~ statute provides that any person with intent to defraud shall make or draw or utter or deliver any check * * * for the payment of money upon any bank * * * and thereby obtain from him personal property, money or other thing, knowing at the time of such making, drawing, uttering or delivering that the maker has not sufficient funds in or credit with such bank for the payment of such check in full upon its presentation shall be guilty of a ~~minimum~~ misdemeanor.

The indictment, in our judgment, charges that the plaintiff in error with the intent to defraud did make and deliver a check for the payment of money upon a bank and did thereby obtain property from one Robert E. Miller of the value of One thousand and four hundred (\$1,400.00) dollars, and it further charges that the maker of said check then knew at the time of making and delivering such check he did not have sufficient funds in or credit with such bank for the payment of such check. We are of the opinion that there is no merit in the motion to quash the indictment.

It is next urged by the plaintiff in error that the verdict is contrary to the evidence. The evidence is to the effect that the plaintiff in error procured the automobile in question by giving a check for One thousand three hundred and fifty-five \$1,355.00 dollars. By the issuing and delivering of the check, plaintiff in error represented that he had the money in the bank and that the check was good. The check was returned in the usual course of business procedure. The check was presented for payment, payment was refused for lack of funds. Plaintiff in error was notified of the fact that his check had been turned down and he requested that the check be put through the bank again and that it would be paid. The check was again presented for payment and it was refused for the second time on account of the lack of funds. The record further discloses that it was protested on May 11, 1928. The payee in the check stated that he inquired of the plaintiff in error if he had the funds to pay for the automobile and he said that he had. Plaintiff in error testified in his own behalf

the maker has not sufficient funds in his account to
the payment of such check in full upon its presentation
guilty of a misdemeanor.

Plaintiff in error with the intent to defraud defendant and deliver
a check for the payment of money upon a bank to defendant
obtain property from defendant. Plaintiff in error
charges that the maker of said check knew that
making and delivering such check to defendant was not
in or credit with defendant for the payment of such check.
one of the parties that there is no merit in the motion to
dismiss.

It is next urged by

verdict is contrary to the law.

that the plaintiff in error procured the bank to
by giving a check for the amount of the sum of
\$1,320.00 dollars. By the making and delivering of
plaintiff in error.

and that the check was good. The check was returned

because of business procedure. The check was returned for

payment was refused for lack of funds. Plaintiff in error

admitted that his check had been turned down and

refused to cash his check as yet through the bank again and it

was not cashed. The check was again presented for payment

it was refused for the second time on account of the lack of

the bank's funds as that it was protested on May 11.

the bank's check stated that he intended of the plaintiff

to pay for the bank's check and he

that he was. Plaintiff in error testified in his own behalf

and among other things said that he did not know at the time of the making and passing of the check whether he had sufficient funds to pay the check or not but that he was expecting to get some funds from certain automobiles that he was trying to sell or had sold and that the bank refused to loan him money to take care of the check; that he had been doing business at the First National Bank of Rock Falls, Illinois for some time and whenever he did not have sufficient funds in the bank to pay the check that he might draw, the bank would notify him and he would take care of the check. The record shows that the plaintiff in error had a small amount in the bank, less than \$12.00 when he drew the check. The officers of the bank testified that plaintiff in error had done business with them a number of years; that whenever he would draw a check and there was not sufficient funds to pay the same, they would protest the check. The account in question was finally taken care of by a note signed by plaintiff in error with certain persons as sureties and so far as the record discloses the note was a good one. The record shows, however, that the court refused to permit the testimony to go to the jury that the account was settled by the giving of a note.

It is insisted that the court erred in permitting the check in question to go to the jury for the reason that it had certain figures and marks placed thereon which were not on it at the time the same was issued; and also that the memorandum showing the protesting of the check should not have gone to the jury. The court first refused to permit the check to go to the jury but allowed it to be read, in the words as issued, to the jury. Testimony was given as to the condition of the check when issued and what had been placed thereon since the date of its issue. With that testimony in the record the court allowed the check to go to the jury.

In view of the state of the record we are not prepared to say that the fact the court allowed the check to go to the jury, after testimony was given as to the condition of the check when issued, and as to what had been placed thereon, constituted reversible error.

We are also of the opinion that the court did not err in refusing to allow to go to the jury the fact of the satisfaction of the indebtedness by the giving of the note in question.

The real question however, to be determined on this record is whether or not the check was issued with a fraudulent intent. On cross-examination, Allen V. Sieglinger, cashier of the First National Bank of Rock Falls, among other things testified:- That he had known Terhune a number of years, that he did not remember when he started to do business with the First National Bank of Rock Falls. He testified Terhune had been doing business at the bank about ten years. The following questions were asked.

- Q. During that time he has had money there all that time, has he not?
- A. Not always.
- Q. He has had an account there during all that time?
- A. Yes sir.
- Q. The bank carried on a general banking business with him?
- A. Yes sir.
- Q. If he needed money at times they loaned it to him?
- A. Some times.
- Q. And if his account was overdrawn you would call him up and tell him to come over and fix it up?
- A. His account was seldom overdrawn. The only time it was overdrawn was in case of an error, an oversight on our part.
- Q. In case a check came in that would overdraw his account, you protested the check did you?
- A. Yes sir.
- Q. You always did that did you? Without notice to him?
- A. We would call him on the phone and tell him there was a check in.
- Q. Did you do that with reference to this check?
- A. Yes sir.

L. P. McMillian on ~~house~~ cross-examination testified:-

Q. This bank had done business with Harry A. Terhune, for a number of years, had it not?

A. Yes.

. How many years?

A. Ever since he has been doing any business. I cannot say exactly how long it is.

. During the course of business dealings he had carried an account there all that time?

. Yes sir.

. And had borrowed money from the bank?

A. He had before that, not at that time.

Q. You made loans to him?

A. I had not made any loans to him for some time.

Q. If any check came in and there was no sufficient funds there to pay then you called him up and told him about it?

A. We did for a while and for some time they had been instructed to protest the checks without calling.

. Did he tell what Mr. Sieglinger said about calling him on this particular check?

A. Yes sir.

. Do you know whether that was done or not?

A. I don't know whether that was done or not.

The record further discloses that, among other things the plaintiff in error testified:-

Q. When you wrote checks on the bank and there wasn't sufficient money there to pay the check when presented for payment, what did the bank do?

A. They generally called me up to take care of it.

. Then you would go to the bank and take care of it?

A. Yes sir.

Q. During your course of dealings with the bank, did they did they loan you money?

A. Yes sir.

Q. Did anyone else write checks on your account except yourself?

A. My wife did.

Q. At the time you wrote this check, you say you were in the automobile business?

A. Yes sir.

Q. Did you have any money coming in or about to come in to be deposited in the First National Bank at Rock Falls at that time?

A. Yes I did.

Q. What was that?

A. Some car sales.

Q. What happened with reference to that car sale?

A. That fell through at that particular time.

Q. Was it possible then for you to borrow money at the bank?

A. Not right at that time.

Q. Did you afterwards have a talk with Mr. Miller with reference to this check? Did you pay the check?

A. Yes sir.

Q. How did you pay it?

A. With a good note. (the last answer was stricken out by the court as being immaterial)

It is quite apparent from the testimony that the bank, carried plaintiff in error along from time to time, --~~at~~ sometimes they would notify him that there was not funds with which to pay the checks and other times they would protest the check.

Plaintiff in error testified that he had expected money from the sale of a car or cars at the time he made the check in question. This is a matter proper to be taken into consideration as bearing upon the question as to whether or not he had a fraudulent intent in his mind at the time the check was issued. If his dealings with the bank prior to the time in question had been such that they would carry him along and if he did not have funds in the bank with which to pay a check that had been presented he was notified to meet the same, or that it was protested, are matters to be taken into consideration to determine the issue involved in this cause.

Q. At the time you were
unemployed?

A. Yes sir.

Q. Did you have any money coming
to be collected in the first instance?

A. I was paid with reference to that case
that I told through at that particular time.
Was it possible for you to know where it
was at that time?
Did you afterwards have a talk with Mr. Hill
reference to this?

A. Yes. (The last answer was
the court as being immaterial)

It is also apparent from the testimony that
it is also apparent from the testimony that
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tion had been such that
and it did not have funds in the bank
and it was not possible for him to have
and it was not possible for him to have
and it was not possible for him to have

In view of The state of the record, we are not prepared to say that the testimony shows beyond a reasonable doubt that the check was issued with a fraudulent intent. If the plaintiff in error in good faith in issuing the check had in mind that he would have the money from other sales with which to take care of the check, or that the bank would take care of him, then it cannot be said that the check was issued with a fraudulent intent.

The mere fact that no funds were in the bank at the particular time that the check was presented is not sufficient within itself to establish the guilt of the plaintiff in error.

In the case of The People vs. Balalas 334 Ill. 444, at page 446, it is said:- "It is contended by the defendant in error that knowledge of insufficient funds and credit must be inferred from the averment "with intent to defraud". The argument is, that the accused could not have intended to defraud unless he had such knowledge. This does not follow. ~~Wit~~ Neither of these two elements of the offense is to be inferred from the other. Either can be present where the other is absent. For example a person knowing that he has ⁱⁿsufficient funds may issue a check without any intent to defraud as where he expects to deposit sufficient funds before the check can be presented. On ^{the} other hand one having sufficient funds may issue a check with intent to defraud as where he expects to withdraw his deposit before the check can be presented. Furthermore, the statute declares that the "making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud." If the argument of defendant in error is sound then the same proof would be prima facie evidence also of knowledge of insufficient funds and credit. Thus a conviction could be had without actual proof of either knowledge or intent, and where ever anything of value has been obtained by a check dishonored for insufficient funds. This clearly could not have been the intention of the legislature."

In view of the state of the record as disclosed by the evidence in this cause, we are not prepared to say that the check was issued with a fraudulent intent as charged and for that reason

or that the bank would have a right to it.

That no money was in the bank at the time that the check was presented is not material.

It is not necessary to establish the guilt of the drawer.

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It is not necessary to establish the guilt of the drawer.

the judgment should be reversed and the cause remanded, which is accordingly done.

Reversed and Remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

1057
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 L.A. 626⁴

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

FRANK WORTHLEY,

appellee,

vs.

THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAIL-
WAY COMPANY, a corporation,

appellant

Appeal from the Circuit
Court of Peoria County.

Opinion by BOGGS, J.

Appellant prosecutes this appeal from a judgment of the circuit court of Peoria County in an action brought by appellee against appellant under the Federal Employers' Liability Act for personal injuries sustained by appellee while an employee of appellant and engaged in interstate commerce.

This case was before us on a former appeal, and was reversed and remanded for error in appellee's given instructions. (Worthey v. Cleveland, C. C. & St. L. Ry. Co., 251 App. 585.) As the pleadings and evidence are discussed at some length in that opinion, it will not be necessary to again set the same forth here. The pleadings are the same, and the evidence is conceded to be substantially the same as on the former trial.

It is first contended by appellant that the court erred in its refusal to exclude the evidence and direct a verdict for appellant at the close of appellee's evidence on the ground that the evidence did not support the charge of negligence and on the ground that appellee assumed the risk of said employment.

The same contention was made on the former appeal, and we held (p. 594) that this point was not well taken, and that the court did not err in its ruling. That holding is the law of the case, and binding on the parties and on this court. City of Chicago v. Lord, 279 Ill. 167-169; People v. Drainage Comrs., 282 Ill. 514-518; Tribune Co. v. Emery Motor Co., 338 Ill. 537-541; Zeldon v. Commercial Union Assurance Co., 249 App. 656.

CHICAGO & N. W. RAILWAY CO.
v. *Chicago & N. W. R. Co.*

Appellant

Opinion by DOUGLAS, J.

This appeal from a judgment

of the circuit court of Deoria County in an action brought by
appellee against appellant under the Federal Employers' Liability
Act for personal injuries sustained by appellee while an
employee of appellant and engaged in interstate commerce.

This case was before us on a former appeal, and was
reversed and remanded for error in an appeal given judgment.
(*Worthen v. Cleveland*, 300 U.S. 141, 151, 55 S.Ct. 352.)

As the pleadings and evidence are stated as above, it is
first opinion, it will not be necessary to repeat the same.
The pleadings are the same, and the evidence in
conceded to be substantially the same as on the former trial.

It is first contended by appellant that the court
erred in its refusal to exclude the evidence and direct a verdict
for appellant at the close of appellee's evidence on the ground
that the evidence did not support the charge of negligence and
on the ground that appellee assumed the risk of such negligence.
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and we held (p. 594) that this point was not well taken, and that
the court did not err in its ruling. That holding is the law of
the case, and binding on the parties and on this court. City of
Chicago v. Lewis, 279 Ill. 127-128; *People v. Chicago & N. W. R. Co.*, 282
Ill. 111-112; *Chicago & N. W. R. Co. v. Henry Motor Co.*, 282 Ill. 557-558;
Chicago & N. W. R. Co. v. Union Assurance Co., 282 Ill. 680.

It is next contended that "the trial court erred in its refusal to direct a verdict at the conclusion of all the evidence, as the record conclusively shows by a preponderance of the evidence that the consideration paid under the release executed by appellee was retained by him after he was, by his own admission, in full possession of all facts and circumstances surrounding the execution of said release."

In connection with the execution of the release, Harold Gordon Worthey, a son of appellee, testified: "Mr. Gillespie had some papers he made out and he wanted my mother and sister and myself to sign them. My mother didn't know what to do about it. I told her not to sign it. She was quite a lot worried and didn't know what to do. I said I wouldn't sign it. My sister said she didn't know. It was finally signed by my mother and sister first, then I saw what condition my mother was in and I signed it, supposing that when I got down home I would queer it. * * * Then I took my mother and sister in my car and Mr. Smith and Mr. Bach got a taxi driver and drove to LeRoy. * * * While I was there, and while Smith and Bach were there, my father didn't say anything. He was apparently not conscious. I was in the kitchen and Mr. Bach came into the room and said to Mr. Smith, 'Well, have you made any settlement with Mr. Worthey?' He said 'Yes, sir, I have. That is all settled up.' I did not see any papers signed by my father at my home that afternoon. He did not sign any while I was there. I saw Mr. Smith holding a fountain pen in his hands when he started to leave, and holding some papers."

Susie Worthey, the wife of appellee, testified with reference to said transactions as follows: "I signed my name to a paper in Mr. Gillespie's office that day. * * * I wasn't in condition to sign it, because I was all torn up over Mr. Worthey. Defendant's Exhibits B. and C. are the papers I signed. Gordon signed it too, and said he didn't think that was enough, in the condition his father was in, for we knew that he would never work any more. My daughter signed it because I asked her to. * * * When I got back Mr. Worthey's condition was bad. * * * I think I

was there in the room for a few minutes when Mr. Smith came in, but I couldn't stay in the house very long at a time. * * * I did not see my husband sign anything that afternoon. I didn't see him sign Defendant's Exhibit D. I don't remember signing my name, 'Susie Worthey, LeRoy, Illinois', on that paper. I found a check lying on Mr. Worthey's bed, of which Defendant's Exhibit F. is a photostatic copy." She further testified on cross examination that she deposited the check in question, representing the amount specified in said release, less the attorney's fees, in a checking account in the bank, and drew checks against it; that appellee may have also drawn checks against it, and that "the money was used for living expenses."

Appellee testified that he did not know anything about any of the transaction at his home on the day said release was executed and testified: "The first time I knew or heard that an alleged settlement had been made was probably eighteen or twenty days after I come back from the hospital at Bloomington in January, 1927. After I learned that I simply raised the devil." On cross examination he testified that the proceeds of said check were deposited in the LeRoy bank to his credit; that he drew checks upon it in his own name and used the money "and knew that it was part of the settlement" that came from appellant; that all of the money had not been used when he first learned of the settlement.

Loretta Worthey, a ²⁴daughter in law of appellee, testified: "When Smith and Bach came into the room Mrs. Wheeler went out. They left my mother in law, Gordon Worthey and myself with the two men. Mr. Bach asked me if he was ready to settle, and I said he was in no condition to do any business as Dr. Sargent had just left him a short time ago, and Mr. Bach asked Mr. Smith, Gordon Worthey and myself to leave the room, and we left Mr. Bach, my mother in law and father in law in the room. I later went back into the room and Mr. Bach and my mother in law went to the kitchen. That left Mr. Smith and I in his room. Mr. Smith asked him if he didn't want to make a settlement and he didn't say

anything. Mr. Smith raised my father in law up in bed and picked up a magazine lying on the bed, laid it in front of my father in law and handed him a pen, and laid a paper down on the magazine and guided my father's right arm with his own hand. I could not see what was written on it. My father in law sat there like he didn't know what he was doing, and said nothing."

The testimony on behalf of appellant, by L. Earl Bach, then attorney for appellee, and O. E. Smith, district claim agent for appellant, is to the effect that, at the time of said transaction, appellee talked and joked with them; that he read the release in question and signed it, and that it was their opinion that he was capable of ~~the~~ transacting business. Dr. E. E. Sargent also testified on behalf of appellant that he treated appellee after his injury; that he saw appellee in his home between 1 and 2 o'clock on the morning of December 30, and saw him again about 10 o'clock that morning; "I talked to him at 10 o'clock that morning. His ability to talk and converse at that time was perfectly rational. On the morning of December 30th, at 10 o'clock, he told me where his wife, son and daughter in law had gone. He said they were up there for the purpose of getting a settlement from the Big Four. * * * At 10 o'clock at that morning I gave him a hypodermic of codeine, one-quarter of a grain. I gave him no other medicine. I remained twenty or thirty minutes after that. The administration of the codeine relieved the spasm; it absolutely did not cause any unconsciousness."

Appellee's first replication to said plea of release avers in substance that "he did not release or discharge any person, persons or groups, or anyone, by a certain writing from liability, as alleged in the said plea of defendant; and of this he puts himself upon the country."

Said second replication averred in substance "that the said certain writing of release alleged and referred to in the plea of the defendant was obtained from the plaintiff on the 30th day of December, A.D., 1926, at which time he, the plaintiff, on account of the injury alleged in the said declaration, was

at the time of the...
...
...

... said nothing.

... on behalf of...

... said nothing.

... about the applicant, as to the time that, at the...

... applied, applied and joined with them;

... the release in question and signed it, and that it was...

... origin that he was capable of the foregoing... M. H. H.

... also testified on behalf of the applicant that he was...

... injury; that he was injured in the house...

... on the morning of November 10, 1911...

... at 10 o'clock that morning...

... the ability to talk and understand...

... time was perfectly rational. On the morning of November 10, 1911, at...

... 10 o'clock, he told me where his wife, son and daughter...

... he said they were in the house...

... a certificate from the District...

... I gave him a hypothesis of cocaine, and he said it was...

... I gave him no other medicine. I remained twenty or thirty...

... the administration of the cocaine I believed...

... it absolutely did not cause any mental disturbance."

... applied's first application to said...

... in substance that he did not receive...

... person or group, or anyone, by a certain...

... as alleged in the said file of documents; and...

... said second application received in substance...

... said certain writing of Robert Elliott and returned...

... alleged in the said decision.

suffering great pain, and on account thereof was under the influence of drugs, administered as treatment on account of the aforesaid injuries, and on account thereof plaintiff avers that he was not in possession of his mental faculties, and did not sign a release or discharge, as alleged in the said plea of the defendant, with knowledge of the meaning of such release, or any knowledge of what he was signing, or that he was signing at all. * * * And plaintiff avers that he did not intend to execute a release of damages, or understand or know that he was signing a release. And plaintiff avers that on account thereof such alleged release as referred to in the plea of the defendant in the execution thereof was obtained by fraud and circumvention, and this he is ready to verify, etc. Wherefore, he prays judgment, etc."

There was no sufficient evidence to support appellee's first replication. Conceding its sufficiency, however, the evidence discloses that the consideration paid for said release was retained and used by appellee with knowledge that it had been paid in settlement of said cause of action. There would, therefore, be no right of recovery.

While appellee's second replication avers, as a conclusion, that said release was obtained by fraud and circumvention, it contains no averment of fact as to how said release was obtained, or by whom. There is no averment even tending to connect appellant therewith.

As stated in our former opinion, "It is a well settled principle of law that a party to a contract who seeks to rescind it on account of fraud practiced on him, must tender back what he has received under the contract, so that the other party may be placed in the same position in which ~~was~~ he was before the contract was entered into." *Worthey v. Cleveland*, C. C. & St. L. Ry. Co., supra, 595, citing: *Huiller v. Ryan*, 306 Ill. 88; *Bryan v. Cole*, 164, Ill. 116; *Hansen v. Gavin*, 280 Ill. 354; *Wenegar v. Bollenbach*, 180 Ill. 222. We also held that "The fraud which will obviate the necessity of the return of money paid in settlement

for a release is the fraud of the party procuring the release, and must be an actual, intentional fraud. *Bowen v. Schuler*, 41 Ill. 192-195; *Wheeler v. Mather*, 56 Ill. 241; *Wolf v. Dietzsch*, 75 Ill. 205-210; *Pawnee Coal Co. v. Royce*, 184 Ill. 402-411; *Litchfield & M. R. Co. v. Shuler*, 134 App. 615."

It is also necessary that a party to a contract, desiring to rescind it for fraud, must make his election to do so promptly after learning of the fraud. *Greenwood v. Penn*, 136 Ill. 146; *Hansen v. Gavin*, supra; *Huiller v. Ryan*, supra, 94; *Worthey v. Cleveland, C. C. & St. L. Ry. Co.*, supra, 596. A party should not be permitted to speculate with reference to the possible outcome of his suit for damages. *Paulen v. Springfield Consolidated Ry. Co.*, 166 App. 382-384.

Notwithstanding our holding on the former hearing that the second replication did not charge any actual, intentional fraud, appellee, without amending his replication, again submitted his case for trial. In view of the state of the pleadings, we are compelled to hold that the trial court should have directed a verdict at the close of all of the evidence.

It may have been that, in passing on the instructions on the former appeal, our language was not carefully guarded and may have left room for the impression that a verdict in favor of appellee could be sustained on said pleadings and substantially the same evidence. We did not so hold, but held that appellee, in order to maintain his action without a return of said consideration, must aver and prove actual, intentional fraud. At page 597 of the opinion we said:

"Both at law and in equity, it is essential that the facts and circumstances which constitute fraud should be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer. *Smith v. Brittenham*, 98 Ill. 188-199; *Murphy v. Murphy*, 189 Ill. 360-365; *Bouxsein v. First National Bank of Granville*, 292, 500-503.

"The facts on which a charge of fraud is based must

be alleged in the pleadings, and must be supported by the evidence. Allegations without proof, or proof without allegations, are not sufficient. Leahy v. Nolan, 261 Ill. 219-221; Houlihan v. Morrissey, 270 Ill. 66-70; Fisher v. Burks, 274 Ill. 363-367."

While we did not there express any opinion as to the weight of the evidence we do not hesitate in saying that on the whole evidence, the verdict of the jury, assuming the pleadings to be sufficient to support a charge of actual, intentional fraud, is against the manifest weight of the evidence. In order to support a finding that said release was obtained by fraud, we would have to hold that appellee's attorney, his wife, his son and his daughter were active participants therein, and that appellee's daughter in law acquiesced therein. We are not ready to so hold.

Appellee having failed to amend his second replication to meet our holding on the first appeal, and the evidence being substantially the same as on the former appeal, we see no occasion for reversing and remanding said cause, inasmuch as, under the pleadings, appellee's failure to return the consideration received bars his right of recovery.

For the reasons above set forth, the judgment of the trial court will be reversed. The clerk will enter as a part of the judgment herein that we find as an ultimate fact that appellee received a consideration of \$2,500 in cash and \$100 in addition thereto, for physician's expenses, for the execution of the release in question; that no actual or intentional fraud occurred in the procuring of said release; that appellee retained and used the consideration for said release, after being fully advised that the same was paid in settlement of his ~~case~~ cause of action.

Reversed, with finding of fact.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

106 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk. 253 L.A. 0265

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 21 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1930.

Alice K. Baccus,

Plaintiff in Error,

vs.

Error to the Circuit Court of
Winnnebago County.

N. O. Gunderson and Rudolph
Kjellquist

Defendants in Error,

OPINION by BOGGS, J.

Plaintiff in error, hereinafter called plaintiff, instituted an action on the case in the circuit court of Winnnebago county against defendant in error, hereinafter called defendant, and one Rudolf Kjellquist, to recover damages for the alleged unlawful quarantine and detention of the plaintiff, for libel, slander, false imprisonment, assault and battery and trespass quare clausum fregit.

On the trial of said cause plaintiff dismissed her suit as to Kjellquist, and a verdict of not guilty was returned as to the defendant, upon which verdict judgment was rendered.

The trial court certified that the validity of section 2 of "An Act to Create and Establish a Board of Health in the State of Illinois," under the State and Federal constitutions and that the validity of a municipal ordinance and the rules and regulations of the Illinois Department of Public Health were involved, and that said cause should be reviewed by the supreme court. The supreme court held that a writ of error to that court from the circuit court, would not lie and transferred the cause to this court. Baccus v. Gunderson, 338 Ill. 301.

The pleadings, questions involved, etc., were set forth and discussed by the supreme court in its opinion, and ~~quote~~ therefrom preliminary to the discussion of the matters before this court for determination. At page 303 the court says:

"The declaration consisted of nine counts, to which demurrers were filed and overruled. The first charged libel in the use of the words, 'Small-pox exposure quarantine. Keep out,' contained on a notice posted by Gunderson on the door of the house occupied by the plaintiff as her home. The second and ninth counts each charged libel by publishing in a newspaper of Rockford, in substance, that the plaintiff had been exposed to small-pox and was a person to be shunned. The third charged slander, consisting of a statement that the plaintiff had been exposed to small-pox and was a person to be avoided and dangerous to be associated with. The fourth and fifth counts charged assault and battery, the sixth and seventh assault and imprisonment, and the eighth trespass quare clausum frogit. The defendants pleaded the general issue and filed special pleas to the various counts, justifying the placarding of the plaintiff's home because William M. Vaccus, Jr., a child of the plaintiff, residing with her, had been exposed to small-pox and was not immune to small-pox because of a previous attack or a successful vaccination within five years, and the defendants, as agents of the Illinois Department of Public Health, placed a warning card on the house where the plaintiff resided, containing the words, 'Small-pox exposure quarantine. Keep out,' pursuant to the statutes of the State and regulations promulgated by the Illinois Department of Public Health, and instructed the plaintiff that under the rules promulgated by the Illinois Department of Public Health she should not leave the premises until the warning was removed. The fourth special plea, which was filed to the first and second counts only, and the fifth special plea, which was filed to the third, fifth and sixth counts only, stated

further that there existed in the city of Rockford, by virtue of an ordinance duly passed and recorded, a board of health, consisting of the mayor, the chief of police and a commissioner of health appointed by the mayor by and with the consent of the council; that said board of health was composed of J. Herman Hollistrom, mayor A. M. Bargren, chief of police, and W. L. Gundersen, commissioner of health, and that Kjellquist was assistant commissioner; and the pleas justified the posting of the warning, and the actions taken relating thereto, as official acts, as well as authorized by the statute and the rules and regulations of the Illinois Department, of Public Health. The plaintiff filed replications, concluding to the country to all pleas.

"The validity of no municipal ordinance is involved.

" * * * No ordinance either establishing a board of health or prescribing the duties of the department of health of the city is in evidence. Such a department of health as the ordinance contemplated was not a board of health and could not exercise the authority to determine when a citizen had or had not been exposed to small-pox, which was a pre-requisite to action to prevent the spread of small-pox. The ordinance quoted does not attempt to delegate to the department of health or the health commissioner any authority which should be delegated to a board of health and has no application to the issues in this case. Here a municipal ordinance is not relevant to the issues in a case its validity cannot be involved. (Brundage v. Chicago, Burlington and Quincy Railroad Co., 384 Ill. 74.) No constitutional question was involved in determining the application of the ordinance.

"The twelfth assignment of error is as follows: 'The court erred in not holding the act of the legislature entitled, 'An act to create and establish a board of health in the State of Illinois,' and especially that part thereof appearing in section 2 of said act in words as follows, 'It shall be the duty of all local boards of health, health authorities and officers, police officers, sheriffs, constables and all other officers and employees of the State or any county, village, city or township thereof, to

~~motion~~

"enforce the rules and regulations that may be adopted by the State Board of Health, Health," was unconstitutional under the constitution of the State of Illinois and the constitution of the United States of America.'

"A constitutional question does not arise by the mere assignment of error or by argument. Before this court can take jurisdiction of a direct appeal from a trial court on the ground that a constitutional question is involved, the constitutional question must really exist and must be presented by the case. The question must be one which is fairly debatable or it is insufficient to confer jurisdiction. (Burns v. Illinois Central Railroad Co., 258 Ill. 502; Boylan v. Chicago Title and Trust Co., 240 id. 413; Griveau v. South Chicago City Railway Co., 213 id. 638; Beach v. Peabody, 188 id. 75.) Counsel for the plaintiff in error does not really argue that the statute is unconstitutional. He insists that the correct doctrine is announced in Peterson v. City of Chicago 304 Ill. 222, in this statement; 'General authority is given to regulate the police, to pass and enforce all necessary police ordinances, and to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, and these general powers may be called into exercise to make effective the powers expressly given, but they are limited to that object.' The statement in People v. Robertson, 302 Ill. 422, which counsel for the plaintiff in error also quotes, is exactly in point and disposes of this alleged constitutional question: 'The health commissioner of Chicago is surely a ministerial officer and had no legislative powers whatever. The statute gives to no such individual authority to make rules and regulations which shall have the effect of law. The city has no right to give him authority to determine when a contagious and infectious disease exists and to establish a quarantine. His authority is limited to carrying into execution proper orders of a legally constituted board of health.'"

In May, 1926, plaintiff, with her husband, a son, William Baccus, Jr., about fourteen years of age, and a daughter, Frances, about ten years of age, resided in the city of Rockford. The two

children were attending the public schools, namely the Colonel Ellis school, and William the Theodore Roosevelt Junior High School.

On May 4, 1926, Winifred Pratt, a pupil at said high school, became sick, and was examined by defendant, who diagnosed her sickness as small-pox in the eruptive stage. At about 4:30 P.M. on May 7, plaintiff received from the defendant, through her son William, the following notice:

"By order of the Board of Health of the City of Rockford it will be necessary for your child to be vaccinated or placed in quarantine at home. (Signed) H. B. Gunderson, M.D., Commissioner of Health, City of Rockford. Obtain signed statement from your physician if child is vaccinated at this time, and present same to the school principal."

Nothing further was done by said authorities in connection with said matter until May 11. Plaintiff testified:

"On the 11th, Dr. Kjellquist came to my home * * * and * * * asked me if I intended to have William vaccinated, and I said no. He said it would be necessary for him to tack up an exposure sign, and it would be necessary for William to stay in for, I think twenty days. I told him I was opposed to an illegal sign. * * * He left, saying 'he will be back.' Then, between 5:00 and 6:30 that afternoon Doctor Gunderson came to my home and I told him I was opposed to illegal signs and felt they couldn't prove that William had been exposed, and that ~~it~~ it was not lawful for them to tack up any signs. He told me: 'Well, because, there are two things I can do in helping you out of this; the first is this--if you will allow me to tack up an exposure sign on your door, I'll immediately wire the head of the State Department at Springfield, at my own expense, and this will allow you to come and go at will. Then, here is another thought; have you your screen door up?' I said 'No'. He said, 'You put on the screen door, and I will just tack up a small white card so that it will not be noticed, and that will give you the freedom to come and go at will.' * * * He told me he had authority to tack up these signs and if he tacked it up, it would be necessary for us to leave it there, and he would fine me \$300."

He went out in the hall and I said, 'Well, you tack up the sign, if you tack up the sign, it will come down, and if you tack up another one, it will come down.' He pushed me around in the hall and said, 'I'll fine you \$200 for every sign you tear down off that door.' He stepped out in the hall, and I was standing on this side of the room, and he just took his elbow and pushed me aside. He was very angry, apparently. * * * * He started out the door, pulled the door open, and pulled the sign out of his pocket, and squatted down to tack the sign on the door. I said, 'Dr. Gunderson, you will leave my home; you are angry; you leave my home and the premises.' * * * He finally left."

Plaintiff further testified that defendant returned with a policeman, and tacked a quarantine sign on the door; that, after the sign was tacked up, for several days a policeman was stationed near her home, and that he saw to it that the sign was kept posted, etc.

The defendant, in his testimony, denied having used any force toward the plaintiff, and stated that he told her he was compelled to do what he did, under the rules of the State Board of Health. There was other testimony in the record, but what we have stated will be sufficient, so far as the questions here involved are concerned.

It is first contended by the plaintiff that the defendant was without authority of law in establishing said quarantine. Under the holding of the supreme court the defendant had no authority by ordinance or otherwise for so doing. Said quarantine was therefore unwarranted.

The second and third grounds urged for a reversal are of practically the same character as the first, and are well taken.

At the close of plaintiff's evidence, the court directed a verdict as to the second, third, eighth and ninth counts of the declaration. It is practically conceded that the court rightly directed a verdict as to the second and ninth counts. The ruling of the court on the third count was not referred to in plaintiff's argument, and is therefore taken as waived. As to the eighth count, it is insisted that the only plea filed thereto was a plea of the

general issue; that such plea admits the falsity of the alleged libel, and that justification cannot be shown under said plea. A plea of the general issue admits the falsity of the alleged libel, (Sheahan v. Collins, 20 Ill. 326-329,) and without a special plea, evidence in justification is not admissible. Chicago Title & Trust Co. v. Gore, 223 Ill. 58-62; Illinois Steel Co. v. Novak, 184 Ill. 561. This point is therefore well taken.

It is next insisted that "the sign 'small-pox exposure quarantine. Keep out', being false, was libelous per se." Neither by common law nor by statute would the words referred to be libelous per se.

It is next insisted that the overruling of the demurrer to the declaration established its sufficiency. It is not necessary for us to discuss this proposition, as counsel for defendant concedes its sufficiency.

It is next insisted that the court erred in directing a verdict in favor of Ejellquist as to the last eight counts of the declaration. Thereafter, plaintiff dismissed her suit as to said defendant. She there^{fore} waived any error that may have occurred in the ruling complained of. This proposition is so fundamental that it needs no further discussion.

It is also insisted that the court erred in its rulings on the instructions. In view of the holding of the supreme court and what we have here said, it follows that the court erred in its rulings on certain instructions. As the law governing the issues involved has been sufficiently discussed, it will not be necessary to consider in detail the instructions complained of.

It is further insisted that the defendant acted with malicious intent. Whether he so acted was a question for the jury under proper instructions. Bowie v. Middle, 216 Ill. 553-558; White v. Bourquin, 204 App. 85-94. The evidence does not as a matter of law show malice.

The next ground relied on has to do with the constitutionality of the Health act. This is not for our consideration.

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It is also contended that the rules of the Illinois Department of Public Health are unreasonable, arbitrary and indefinite. This point is not well taken. *Harler v. Garner*, 284 Ill. 546-552; *People v. Robertson*, 302 Ill. 422-426.

It is next insisted that expert testimony as to whether or not the plaintiff's son was exposed to small-pox was not admissible. Inasmuch as we have held that the quarantining of the plaintiff's home by the defendant was not warranted, it would follow that such testimony would not be admissible in bar of plaintiff's suit, but would be admissible in mitigation of damages, should the defendant be found guilty, especially in view of the fact that plaintiff is insisting that the defendant acted maliciously. *Thomas v. Dunaway*, 50 Ill. 373-387; *Storey v. Early*, 86 Ill. 461-483; *White v. Bourquin*, supra 95; 25 Cyc. 476.

It is next insisted that the court erred in permitting parol evidence to the effect that the defendant had been appointed and qualified as Commissioner of Health of the City of Rockford. As the supreme court held that such appointment did not empower the defendant to establish said quarantine, it is not necessary for us to pass on this question.

Lastly, it is insisted that the verdict is against the manifest weight of the evidence. Inasmuch as this cause may be retried, we do not deem it best to pass on the question of the weight of the evidence.

For the foregoing reasons, the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

107 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

258 LA. 627'

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 24 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

INLAND FINANCE CORPORATION,

Appellee,

-vs-

CYRUS SANFORD, Sheriff of McHenry
County, and THE HUDSON MOTOR COMPANY
OF ILLINOIS, a corporation,

Appellants.

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Appeal from the
Circuit Court of
McHenry County.

Opinion by BOGGS J.

An action in replevin was instituted by appellee in the circuit court of McHenry County against appellant and one Cyrus Sanford, Sheriff, etc., for the recovery of an automobile. The declaration consisted of three counts, the first of which charged an unlawful taking and detention, the second an unlawful detention, and the third was a count in trover. To the first count appellant filed a plea of non cepit, to the second non detinet, and to the third a plea of not guilty and a special plea of property in appellant company.

A jury was waived and a trial was had before the court. A motion was entered by appellant at the close of appellee's evidence to exclude the evidence and to find the issues for appellant, which motion was denied. Again, at the close of all the evidence, a motion was made to find the issues for appellant, which motion was also denied. On stipulation of the parties, said suit was dismissed as to Sanford. The court found the issues in favor of appellee, assessing its damages at \$443.00. A motion was made by appellant for a new trial, which was overruled, and judgment was rendered that appellee have and recover the possession of the property in question, and for \$443.00 damages, with costs, etc., and "in default of delivery of said car to the plaintiff by the defendant within ten days from the date of this judgment, the plaintiff to have and recover \$1,093.00, being the amount of the present value of said car and the damages for the unlawful detention thereof," etc. To reverse said judgment, this appeal is prosecuted.

On March 22, 1929, the car in question was delivered by appellant to one A. M. Adams, who was doing business at Harvard, Illinois, as the Adams Motor Sales Co. Said delivery was made pursuant to the following written instrument:

"HUDSON MOTOR COMPANY OF ILLINOIS

2220 So. Michigan Avenue.

"Sold to Adams Motor Sales, Harvard, Ill."

Chicago, Ill. 3/22/29

Invoice No. 534 67

"Terms * Net Cash

Delivered To You On Consignment

Description	Price	Amount	Total Amount
Hudson Victoria		1215.23	
Registration		<u>10.00</u>	
		1225.23	
Wire Wheels		18.75	
Ext Tire and tube		15.23	
2 Tire covers	1.75	<u>3.50</u>	1262.71
Down payment			<u>162.71</u>
Balance			1100.00
3 months finance charge			21.50
25%			
Amount of note			1121.50
car #840462--ltr. #577650			
Registration card #3334			

"Your check is a receipt, no receipted invoices mailed back unless specified. No claims allowed unless filed within 10 days from date of invoice. Not responsible for loss or damage by fire or theft to vehicles placed with us for storage sale or repairs. Upon written request we will have same insured at owner's expense. Articles left in cars at owner's risk. Towing cars or driving cars to our garage or delivering same back to owner or while being tested is at customer's risk as it is assumed car is protected with insurance.

"Filed McHenry County, Illinois, Feb. 15, 1930. Will T. Conn."

On April 29, 1929, one W. W. Siperly entered into a conditional sales contract with Adams for the purchase of said car. Among other things, said contract provided:

"The Adams Motor Co. has this day delivered and agreed to sell to the buyer (Siperly) and the buyer has this day agreed to buy from the seller, for and upon the consideration hereafter recited, the following * * * Hudson victoria, new car * * * and agrees to pay to the seller or assigns for the same the sum of \$1,035.00 in twelve monthly installments, \$86.25 one month after date, and \$86.25 on the _____ day of each succeeding month hereafter until paid, and each of said monthly installments shall bear interest at the rate of 7% per annum after maturity.

"The purchase price is further evidenced by a negotiable note signed by the buyer, payable in monthly installments as aforesaid.

"Title to the car and equipment shall not pass by delivery to the buyer, but shall remain fixed in and be the property of the seller or assigns until the purchase price has been fully paid, subject to the subsequent provisions of this contract," etc.

Thereafter, said conditional sales agreement was, for a valuable consideration, assigned to appellee, and was filed for record on August 23, 1929. The car in question was never removed by Siperly from Adams' place of business. On August 21, 1929, Adams disappeared and has never been heard of since. On August 22, 1929, appellant took possession of said car, together with other Hudson and Essex cars then in the place of business conducted by Adams. By agreement, the car in question was placed in the hands of said sheriff, to abide the result of this proceeding.

In addition to the foregoing, a representative of appellant, whose business it was to visit the agents of appellant to check the cars that had been sold, etc., testified to the effect that on June 22, 1929, Adams executed an instrument or receipt for the car in question and paid three months additional interest on the amount unpaid thereon; that at that time Adams told him said car had not been sold.

It is first contended by appellant that the court erred in finding that appellee was entitled to the possession of said car. Counsel in his argument states: "It is conceded that if Adams, having possession of the car, had sold it to a bona fide purchaser and had taken back a conditional sales contract and note in partial payment of the purchase price, and then assigned the conditional sales contract and note to a third party, converting the proceeds of the sale to his own use, appellant's only recourse would have been Adams," but insists that ~~ex~~ the sale from Adams to Siperly was not bona fide, and, by reason thereof, appellee was not entitled to recover.

In this connection, appellant relies on the testimony of Siperly, which was to the effect "That he had a business transaction with Adams during the month of April, 1929; that he dealt for a car; * * * it was the car in question in this suit; Adams asked Siperly if he would do him a favor. * * * Adams wanted to know if he would help him out on a deal of a car. * * * Adams wanted him(Siperly) to sign for this Hudson car. * * * He (Siper-ly) got in the car with Adams and went to his office, and when he got there these papers were executed. After he went to his home, he did not take the car back with him. He never, further than that, took the car. * * * At the time he signed the contract, he did not have any intention of purchasing a car; that he did not purchase the car; that Adams explained to him that he wanted him to sign up for this car, which would help--be a favor to him, to help him out. * * * Adams did not tell him what benefit he was going to derive if he signed the note. He did not make any down payment of the car and did not make any payments that were paid to the finance company."

If this controversy were between appellant and Siperly, appellant's argument would be well founded. Appellee, however, was a bona fide assignee for value of said conditional sales contract. This is not controverted, other than it is claimed there is nothing to show that the draft made on appellee, and which

was accompanied by said conditional sales contract, was in fact paid. From the facts and circumstances in evidence, the court was warranted in finding that it was paid. The ~~real~~ real question, for our determination is as to whether appellant, by its conduct in connection with the car in question, is estopped from questioning the rights of appellee.

Vernon Swanson, a representative of appellant, testified as follows, in answer to questions propounded by the court: "The court: He had no right to sell it, had he, without settling with you, getting your release? He had to get the car clear, didn't he, in order to sell it?

"A. Well, the agreement is that if the car is sold he immediately--rather he keeps the funds separately and immediately sends it in to us.

"The Court: You permit him to sell, do you, without releasing the car and take his word to send in the funds?

"A. Immediately, yes, sir.

"The Court: Yes. Well, that is the method of your business, is it?

"A. Yes, sir.

"The Court: He may sell it if he wants to any time, to anybody?

"A. Yes, sir.

"The Court: And then you look to him to send in the funds?

"A. Yes, sir."

Section 23 of the Uniform Sales Act (Cahill's Stat., chap. 121a, par. 26) ~~pro~~ provides:

" Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In Drain v. LaGrange State Bank, 303 Ill. 330, the court, in discussing a question of this character, at page 335 says:

was accompanied by said condition of sale contract, and it is
said. Now the facts and circumstances in evidence, and the
the vendee in failing to do so. It is said that the
for the vendee is as to the contract, and it is said
that in connection with the contract, it is said that
negotiating the whole matter.

Now, the contract, a contract of sale, and it is
said as follows: In order to receive the contract, the vendee
"The contract: He has no right to sell it, and it is said that
with him, getting him to sell it, and it is said that
didn't he, in order to sell it."

"A. Well, the agreement is that in the case of the contract
ly--rather, he has the right to sell it, and it is said that
it is to be."

"The contract: He has no right to sell it, and it is said that
and the vendee is said to be the contract."

"A. Immediately, yes, sir.
"The contract: Yes, well, that is the nature of the contract,
is it."

"A. Yes, sir.
"The contract: He may sell it in the case of the contract, and it is said
is it."

"The contract: And the vendee is said to be the contract.
is it."

Section 27 of the contract, after that (testimony).
shall, 1812, sec. 27 (testimony).
"Subject to the provisions of this act, where goods
are sold by a person who is not the owner thereof, and who does
not sell them under the authority or with the consent of the owner,
the buyer acquires no better title to the goods than the seller
had, unless the owner of the goods is by his conduct estopped
from denying the seller's authority to sell."

In Dunn v. Lagan, 100 Ill. 450, 1883, the
court, in discussing a question of this character, said the
case:

"An estoppel may operate against the person claiming what would otherwise be the better title, and this is based upon conduct of the true owner by which he allows another to appear as the owner of or having full ~~power~~ power of disposition over property, so that an innocent third person is led into dealing with an apparent owner. The estoppel does not depend upon where the actual title is, but rests upon the act of the real owner, which precludes him from disputing the existence of the title which he has caused or allowed to appear to be vested in another. If a vendor of a chattel delivers it to a vendee or allows him to have possession of the same before payment of the purchase price, and to have all the indicia of ownership, retaining, however, a secret lien for payment, he cannot assert his right against a judgment creditor of the vendee without notice, before a levy is made. An innocent purchaser will be protected without regard to the terms of the contract of sale, where the appearance of ownership is in one while the title is really in another, or there is a secret lien." Citing *VanDuser v. Allen*, 90 Ill. 499; *Chickering v. Bastress*, 130 Ill. 206; *Union Stock Yards & Transit Co. v. Mallory*, 157 Ill. 554.

To the same effect are *Illinois Bond & Investment Co. v. Gardner*, 219 App. 337-343; *National Bond & Investment Co. v. Shirra*, 255 App. 415-419. In the latter case, the court at page 419 says:

"The facts under consideration in *Illinois Bond & Investment Co. v. Gardner*, 249 App. 337, are very similar to those in the instant case. There, a company engaged in the business of selling automobiles took an automobile, with permission of the plaintiff, to its regular place of business and placed it in the display room. It was bought by a purchaser and the plaintiff claimed title under a trust agreement. In its opinion the court said: 'A customer going into a retail store and seeing goods on display offered to the public generally for sale, buying such goods, in good faith, should be protected against the holder or owner of any secret lien of which the purchaser has no notice.

To hold otherwise would seriously interrupt business."

While, so far as the record discloses, appellee did not go to Adams' sales room and there see the car in question on sale, still we think the foregoing authorities, in principle, fully warrant a holding that appellee as the assignee of said conditional sales contract without notice of any secret lien, should be protected as against appellant. If appellant was caused to suffer, it was by the fraud of Adams, its own representative.

Appellee insists that the car in question was in fact sold to Adams by appellant. There is substantial evidence in the record to support this contention, but whether or not, as between appellant and Adams there was in fact a sale,--as against appellee, appellant is not in a position to contend that the sale of said car by Adams to Sinerly was not bona fide. The court did not err in finding that appellee was entitled to the possession of said car.

It is next insisted that the court was without jurisdiction to order a return of the property. In this connection it is insisted that the replevin writ and bond were not properly delivered. In view of the stipulation that the automobile was to remain with the sheriff, etc., this objection is unavailing.

It is next insisted that the court erred in the rendition of its judgment. There is no contention that the assessment of \$443.00 damages is not supported by the evidence. The assignment of errors does not question the same. Appellee concedes that the court erred in entering the alternative judgment of \$1,093.00, and specifically waives that part of the judgment. This it has a right to do, as in principle it partakes of the character of a remittitur. *Alvin v. Kinney*, 96 Ill. 214.

Other errors were assigned, but what we have already said sufficiently disposes of the questions sought to be raised by the same, and it will not be necessary for us to discuss them in detail.

The alternative judgment for \$1,093.00 having been

waived or resitted by appellee, the judgment of the trial court for possession of the property in question and for damages of \$443.00 and costs is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



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Chancery

Jan 10 1930

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253 I.A. 627²

General No. 8407

Agenda No. 6

January Term, A. D. 1930

MINNIE M. HENRY, Appellee,

vs.

LAURA W. LEEDERS, et al., Appellants.

Appeal from Circuit Court, McLean County.

ELDREDGE, J.

Appellee filed her bill in chancery for the partition of certain farm lands located in McLean County. She and appellant, Laura W. Leeders, were sisters, tenants in common and sole owners of the premises in question. Upon the hearing a decree was entered for the partition and the lands were sold. The assignment of error in this case is that the court erred in allowing solicitor's fees and taxing one-half of the same together with one-half of the costs to appellant. In the answer of appellant it is denied that she refused to join in a voluntary partition of the premises and is averred that she wrote complainant suggesting that they select appraisors to appraise the fair, cash, market value of the premises and that appellant would either buy or sell at the appraised value but received no reply to such communication. It is also averred in the answer of appellant that in September, 1926, appellee instituted a partition proceeding to divide said premises and that while

said suit was pending appellant and appellee adjusted the suit by entering into an agreement that the suit should be dismissed which was done; that they further agreed that in the future, so long as they were joint owners, the land should not be subjected to court proceedings for division, but that in case either one decided to sell her interest they would join together and make a private sale, if possible, at a price mutually satisfactory and divide the proceeds according to their interests without costs or expenses, and in case either of them should decide to purchase, one would sell to the other.

Appellee and her husband lived upon the premises and farmed the same, paying a cash rent of \$6.00 an acre to appellant for the latter's undivided, one-half interest. Shortly before the present suit was brought the lease of appellant's undivided interest being about to expire, appellee desired to renew the lease at \$5.50 an acre which appellant refused to do. Thereupon appellee brought this partition suit. To sustain the alleged covenant of appellee not to bring a suit to partition said lands as alleged in the answer, appellant testified as follows: "After the first suit was filed I asked her (appellee) to take it out, that we wouldn't get nothing for it if she put it through court. At Mr. Goodwin's office I asked her to take the case out of court, because our father left it to us girls, that when

we got old we would have something to go on our last days, and she agreed to take it out, that we would keep it, and I asked her if she would put it up any other time, and she said, 'No,' and she asked me the same, and I said, 'No, not so long as I had my right sense.' Had another talk at home after the talk at Mr. Goodwin's office. It was the same thing and she took the case out of court."

The right to partition is absolute and results from the existence of the relation of tenants in common and the motive for bringing such a suit can not be questioned. **Trainor v. Greenough**, 145 Ill. 543; **Friedman v. Friedman**, 283 Ill. 383; **Martin v. Martin**, 170 Ill. 639. Appellee in her testimony denied that she ever promised not to bring a partition suit and she and appellant were the only witnesses who testified upon this proposition. In some instances the absolute right of partition is subject to certain exceptions. It was held in **Hill v. Reno**, 112 Ill. 154: "Notwithstanding the rule as stated is almost universally conceded, nevertheless there are several well recognized modifications of it. For instance, if an estate should be devised or otherwise conveyed to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the

absence of special equities, award a partition at the suit of some of the parties, against the objections of the others." The burden was upon appellant to prove that appellee covenanted not to bring a suit for partition. If her testimony, if true, can be construed as amounting to such a covenant, it was definitely denied by appellee. The Master heard the testimony of the parties and found that no such covenant was made between them. In the case of **Hynes v. Jennings**, 262 Ill. 268, where a similar defense was attempted to be made one co-tenant testified to having had a talk with the complainant in the office of her attorney about what was the best thing to do with the property, and that she said that she did not want a partition suit started,—that she wanted to settle the best way and with the least expense possible. The court held: "This falls far short of an agreement among the parties that there should be no partition of the premises. The fact that she did not want a partition suit started and so expressed herself, was no bar to her right to apply for a partition at any time she so desired."

The Chancellor did not err in allowing solicitor's fees and apportioning the costs in the manner stated and the decree of the Circuit Court is affirmed.

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2581A. 437³

General No. 8376

Agenda No. 9

October Term, 1929

CHARLES C. CARTER, Appellant

vs.

THOMAS ADKINS, Appellee.

Appeal from Macon.

NIEHAUS, J.

This is a suit commenced by the appellant Charles C. Carter in the circuit court of Macon county, to recover damages from the appellee Thomas Adkins, for personal injuries suffered by him in an automobile accident which occurred on one of the state highways, namely, Route No. 2, near the city of LaSalle on December 10, 1928.

The evidence shows, that the accident occurred at a point on the road where there is a culvert and a concrete abutment on the northerly side of the road. The evidence also shows, that the appellant at the request of the appellee took a trip with him to Rochelle from Decatur; and the accident occurred on the way back from this trip from Rochelle to Decatur. As to the manner in which the accident occurred, the appellant testified, that after leaving LaSalle and driving along Route No. 2, they reached a frosty place on the pavement; and 'as they went over the frosty place the car started to skid to the north; and skidded over the center black line; that Adkins put on his brakes and the car came back; that after that the car began to skid and went to the north

of the center line; that the pavement there is eighteen feet wide with a shale and cinder shoulder on the north side. This shoulder is about 15 feet wide where the car began to skid, and was level with the pavement; that on the south side the shoulder is 6 feet solid and even with the pavement; and of cinders and shale. That when the car skidded to the north it stayed on the pavement; and it skidded about 25 feet. There was a ditch on the south side and 50 feet east from where the car started to skid there was a culvert. The concrete abutment of the culvert extended about 18 inches above the level of the shoulder. The abutment was about 12 feet long.' He further testified that: "When we got near the abutment the car skidded to the south. I saw the defendant put on his brakes with his foot. Immediately after he did, the car skidded to the south and the right front wheel got on the culvert. The car was facing southeast. The car was facing east when the defendant applied the brakes. We were going east. The abutment is 6 feet from the pavement. The car skidded 15 to 20 feet before striking the abutment. When the brakes were applied the car was on the north side of the center line. The car skidded diagonally southeast. When the wheel hit the abutment, the car turned over. It turned over to the east of the abutment."

The appellee's testimony as to how the accident occurred

is as follows: "Leaving LaSalle we got on the Oglesby road by mistake. Backed up and took Route 2 again. As we approached the place of injury, was driving between 30 and 35 miles an hour. Slab was icy. We didn't know it was ice. We thought it was the shade of the trees until after the accident. On the north side of the road was a deep bank that run down to the Illinois river bottom, very steep. No guard rail fence on either side. South side shaded by a bank and a lot of trees shaded the road, and a deep ravine which was necessary for a culvert. Shoulders were even with the slab. Shoulders were 2 or 3 inches below the level of the slab. Shoulders sloped downward. When we first struck the ice we went along apparently all right, then the car suddenly swerved left, I pulled it back to the right. As it came back I couldn't control it and it went off over the shoulder, the front wheel passing just at the edge of the culvert, both wheels being over the culvert bringing the car right on around over it into the ditch. I applied the brakes just before we hit the culvert. Did not apply the brakes at any time while skidding on the ice, shut off the gas when we first started to skid."

The appellant based his right of recovery on the charges of negligence contained in the declaration which consisted of five counts; but the third count was dismissed. The first count contains a charge of general negligence; the second count also contains charge of general negligence in the managing

of the car; and the fourth count charges that the appellee failed to have the brakes on his car in good order, and that the appellant was injured as the result thereof. The fifth count charges that the appellee drove and operated his car at a greater rate of speed than was reasonable and proper.

The trial of the case resulted in a verdict finding the appellee not guilty, upon which judgment was rendered; this appeal is from the judgment.

A number of errors are assigned and argued for reversal of the judgment. Some of these errors concern the rulings of the court in reference to the admission or rejection of evidence. The record however does not show any substantial errors in that regard. At least none appears to the injury of the appellant. The jury were warranted in concluding from the evidence, that the accident was not due because the brakes on the appellee's car were not in good order; or because he failed to have them in good order and condition; and that the appellee did not operate his car at greater rate of speed than was reasonable and proper; that the accident was due to the fact, that the appellee's car skidded because of ice on the pavement when the car struck the ice at the place of the accident; and that the icy condition of the road at the point of the accident was unknown to the appellee and the appellant; and that they had no reason to expect this condition

until the car ran into it; and that the accident was not due to any negligent act of the appellee; but resulted from the condition of the highway.

We deem it sufficient to say concerning the errors pointed out in the defendant's instructions, that while some matters contained in them may be subject to criticism, there is no reversible error apparent in giving them; especially since it is evident that the jury were not misled into an erroneous finding, on the facts shown by the evidence.

For the reasons stated, judgment is affirmed.
Judgment affirmed.

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258 I.A. 627⁴
General No. 8395 Jan. Term, 1929, Agenda No. 12

The People of The State of Illinois, Defendant in
Error.

vs.

Henry Cathcart, Plaintiff in Error

Error to County Court of Coles County.

NIEHAUS, J.

In this case an information was filed in the county court of Coles county, charging the plaintiff in error, Henry Cathcart, with violations of the Prohibition Act. The first count of the information charges him with unlawful possession of intoxicating liquor; the second count charges, that he was in possession of a still in violation of law; and the third count charges him with unlawfully and wilfully owning operating and maintaining a still; and the fourth count charges him with transporting delivering and furnishing intoxicating liquor in violation of law.

A trial by jury was had concerning these charges, which resulted in finding plaintiff in error guilty of possessing intoxicating liquor as charged in the first count in the information; also finding him guilty of transporting, delivering and furnishing intoxicating liquor as charged in the fourth count of the information.

He was found not guilty of the charges in the second and third counts of the information, namely, unlawful possession

of intoxicating liquor and operating and maintaining a still.

The plaintiff in error made a motion for new trial; also a motion in arrest of judgment, which were overruled by the court; and he was thereupon sentenced by the court to serve five months on the penal farm on the first count of the information; and to serve three months on the penal farm and to pay a fine of \$200.00 under the conviction under the fourth count of the information. This writ of error is prosecuted from the judgment of conviction.

The evidence in the case adduced on the trial shows, that the sheriff of Coles county, Stanley B. Moore, visited the home of one Roseoe Zellers, who was the main witness for the people against the plaintiff in error; and at this visit to the Zellers home, he found a little barrel in the kitchen covered with a blanket, containing liquor; he also found a boiler and coil in the bed room; also found three bottles containing liquor in a little traveling bag in the house; also a fourth bottle containing liquor in Zellers' automobile. Zeller testified on the trial, that the liquor and the boiler and still found in his home, were brought there by the plaintiff in error about eleven thirty at night on June 7, 1929, when all the occupants of the house were in bed; that the liquor in the little barrel or keg was brought in by the plaintiff in error and another man by the name of Charles Scott; that he allowed the plaintiff in error to leave the liquor and the boiler and still,

on his promise that he would remove it the next day. He also testified, that Cathcart had never brought liquor to his house prior to that time; but that the witness had, on several occasions before, purchased liquor from the plaintiff in error. Zeller's testimony with reference to the fact, that the plaintiff in error, in company with Scott, brought the liquor in the little barrel or keg into the house; also the boiler and the still, is corroborated by his wife and by two other occupants of the dwelling at that time, namely, Curt Donley and his wife. There is no evidence to show, that the plaintiff in error ever was found in possession of liquor, or that he transported liquor or sold any to anybody, except the testimony of the witnesses referred to.

Various errors are assigned and argued for the reversal of the judgment. It will not be necessary for the purposes of a review of this case to consider or determine all the questions raised. One of the errors assigned has reference to an alleged restriction by the court of the right of cross examination of the prosecuting witness Zeller concerning sales of intoxicating liquor by him in violation of the Prohibition Act. We are of opinion, that the cross examination was unduly restricted by the court on that question. In the case of **The People v. White** 251 Ill. 67 the Supreme Court said: "It is argued, that the cross examination tended to show, that the defendant ran a gambling house and was an offender

against the law. But if there was an inference of that kind from what the witness said, it was a necessary and inevitable one in the exercise of the right that the prosecution had to bring before the jury the occupation and habits and life of the witness. The law does not permit proof of other offenses not connected with the charge upon which the defendant is being tried. *** But the prosecution could not be hampered nor restrained in perfectly legitimate cross examination because an inference unfavorable to the defendant might rise. Surely the prosecution was not required to permit this witness to appear before the jury as a man of high character and worthy of confidence when he was disreputable and his chief occupation was that of a law breaker." What the Supreme Court said in reference to the point under consideration applied to the right of the prosecution concerning the cross examination of a witness for the defense; it is needless to say, that it would apply with equal force to the right of the defense to cross examine a witness for the prosecution. In **People v. Bond** 281 Ill. 490, the Supreme Court commenting on the point said: "The evident purpose of the questions asked the witness was to discredit her testimony by her answers. It is permissible to inquire of a witness as to his or her occupation. If a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character

who is engaged in a lawful and respectable occupation."

The principal errors assigned however relate to the instructions given for the People. The vice of the second instruction given for the People is, that the instruction assumes that the plaintiff in error had possession of the intoxicating liquors in question; and then advises the jury that such possession is prima facie evidence, that such liquor was kept by him for the purpose of being sold bartered or exchanged or otherwise disposed in violation of the Prohibition Act; and places the burden of proof upon the plaintiff in error to show that such liquor was lawfully acquired possessed and used by him. This instruction also informed the jury that if the prosecution had proved beyond a reasonable doubt that the plaintiff in error had manufactured any intoxicating liquor, this would justify a conviction under the information which included the counts that he was convicted on, namely, for unlawful possession and for unlawful transportation, unless the plaintiff in error showed that the acts complained of were committed lawfully under the provisions of the Prohibition Act. That is to say, if the prosecution had proven, that he had unlawfully manufactured intoxicating liquor he could be convicted on that proof of unlawfully transporting it. The instruction was clearly erroneous and was prejudicial to the rights of the plaintiff in error.

The third instruction contains a definition of reasonable doubt, which is erroneous; and is in conflict with the holding of this court in the case of **People v. Miles** 254 Ill. App. 120; and is also contrary to the holding of the Supreme Court in the case of **People v. Prall** 313 Ill. 518.

The fourth instruction and the eighth instruction given also concern the matter of reasonable doubt involved and are subject to the criticism made by the Supreme Court in the case of **People v. Sell** 296 Ill. 127.

In the fifth instruction given for the People, the jury was instructed concerning the legal force and effect of circumstantial evidence. There is no circumstantial evidence in the case upon which to base this instruction. No circumstances were proven from which the defendant's guilt could be inferred. What the Supreme Court said in the case of **People v. Ambuch** 247 Ill. 451, in reference to a similar instruction, applies directly to the instruction here involved: "Conceding that this instruction states the law correctly, we are unable to perceive why it should have been given in this case, as the plaintiff in error's guilt was not dependent upon any circumstances proven, but if found guilty at all, it could only have been upon facts testified to by the prosecuting witness. The giving of such an instruction where there is no

evidence to base it upon, was held erroneous in **Kev-
ern v. People** 224 Ill. 170."

For the errors indicated, the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

FILED

MAY 21 1930

FEBRUARY TERM, A. D. 1930.

CLERK OF THE COURT
JAMES H. HARRIS

2531A. 6281

TERM NO. 7.

AG. NO. 13.

TRI-CITY STATE BANK, :
Defendant in Error, : ERROR TO
V. :
: MADISON CIRCUIT
: COURT.
DELLA LAND, et al, :
Plaintiffs in Error.: :

Barry, P. J. - Della Land is the daughter of August Koetter and Ida Koetter. In the summer of 1921 a Mr. Holz induced the three persons above named, with others, to become interested in a proposed corporation. So far as the record shows no license to incorporate was ever issued. Mrs. Land took three shares at \$100.00 per share, her mother three shares and her father four shares. Other persons, to the number about a dozen, took shares. The money paid in was used to purchase ovens, etc., and a business was started under the name of Madison Peoples Bakery Company. The business was conducted in a building at Madison, Illinois, owned by Mr. Koetter. Mr. Holz left in a very short time without having taken any steps to form a corporation other than to sell shares at \$100.00 each as above stated. On September 20, 1921, all of the persons who agreed to take stock in the proposed corporation entered into a written agreement appointing Mr. Koetter and four others as a committee to take full charge and management of the entire business and property of the said company, with full power and authority to act for all of the members in all matters and things pertaining to the entire business and property

of the company, ratifying and confirming and agreeing to abide by whatever said committee might do or cause to be done in the premises.

Mr. Koetter and another member of the committee took an active charge and conducted a bakery business until June 1924, when the equipment was sold. The business was conducted in the building owned by Mr. Koetter who died in March 1925. At the time the bakery company went out of business it was indebted to the Tri-City State Bank, the total amount of which on December 24, 1926, was about \$25,000.00.

On the last mentioned date plaintiffs in error and eight other persons who were interested in the business, executed a written agreement in which it was recited that on or about August 17, 1921 the parties to the agreement, with others, entered into a partnership to engage in the bakery business at Madison, Illinois, and that they did then and there engage in said business as partners and that their business affairs and obligations growing out of said partnership business remained unsettled and in dispute; that the partnership is now indebted to the amount of \$25,000.00, in the form of promissory notes, held by the Tri-City State Bank, all of which are renewal notes, some of which are signed in the partnership name, and others signed by two or more of the partners; that some of the partners either deny all or some part of said partnership indebtedness, or refuse to join in the payment of the same, there being no partnership funds or assets to meet the said indebtedness; that some of the said partners have filed a suit to settle the partnership and that said suit is now pending and undetermined; that the banking department of the State of Illinois has notified the Tri-City State Bank to collect said notes; that some of the partners refused to pay their pro rata share of such indebtedness, while others are ready and willing to pay their several pro rata portions thereof.

The said agreement further provides that each of said partners is ^{legally} liable for the entire indebtedness of the partnership, and that those partners joining in this agreement desire to

avoid the notoriety and extra expense of being sued on said notes held by said bank; that it is therefore agreed by and between them to pay all of said partnership indebtedness to said bank pending the determination of said suit for a partnership accounting, and to contribute to such payment to said bank in proportion to their several holdings in said partnership, and which, as expressed in figures, has been determined to be the several sums of money following our several signatures to this agreement, which we severally agree to either pay or assume, to avoid needless expense of suits other than the one pending for a partnership accounting and that we severally agree to abide the result of that suit; it being understood that from the sums of money recovered in that suit from the partners not paying under this agreement shall be rebated to us pro rata in proportion as we have contributed to the payment of said indebtedness to said bank, as shown following our several signatures below; not hereby waiving contribution against each other or against the partners not signing this agreement. The amount therein assumed by Mrs. Land and her mother, is \$6,591.60, for which they executed and delivered to the Tri-City State Bank a judgment note for that amount dated December 24, 1926, and falling due sixty days after date with interest at 6%.

After the note came due the bank took a judgment by confession and on motion of plaintiffs in error the judgment was opened and they were given leave to plead. They pleaded a want of consideration for the note. Upon the trial the jury found the issues in favor of the bank and the court ordered that the judgment theretofore rendered remain in full force and effect.

It seems to us that under the undisputed evidence in the record the parties who subscribed for stock in the proposed corporation which was never even attempted to be organized, must be held to be liable as partners. The contract entered into by plaintiffs in error and others on December 24, 1926, was admitted in evidence without objection and it expressly states that the business was conducted by them as a partnership. That being true

it cannot be said that there was no consideration for the note in question. When the jury found the issues in favor of the bank the court properly ordered that the judgment remain in full force and effect.

Complaint is made as to instructions given on behalf of defendant in error. We find it unnecessary to discuss the instructions for the reason that under the undisputed evidence plaintiffs in error had no defense to the action. The judgment is affirmed.

AFFIRMED.

*Not to be reported
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In The
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
FEBRUARY TERM, A.D. 1930.

FILED

MAY 21 1930

CLERK OF THE APPELLATE
COURT OF THE FOURTH DISTRICT OF ILL.

OSCAR MENG,
Defendant in Error, }
vs. }
WILLIAM LILE,
Plaintiff in Error. }

Error to the City Court
of Granite City.

Honorable M. R. Sullivan,
Judge Presiding.

2581A 628²

OPINION BY NEWHALL, J.

Plaintiff in error purchased certain auto laundry equipment from defendant in error, paying two hundred dollars cash and giving his promissory judgment note for six hundred dollars. The note was payable in instalments and to secure the payment thereof a conditional sales contract was entered into between the parties, in which it was agreed that title to the equipment should remain in defendant in error until the purchase price of the same was paid. The agreement provided for the right to retake possession of the property in the event of default on the part of the maker of the note.

Plaintiff in error operated the auto laundry for about one month. He claims that a few days before the expiration of the month he informed defendant in error he would not make his monthly payment and suggested that defendant in error retake the equipment in cancelation of the debt. That he, plaintiff in error, would forfeit his two hundred dollars down payment which had been made on the purchase. Plaintiff in error claims that this proposition was accepted by defendant in error and that the equipment was turned back to defendant in error in full satisfaction of the debt. Subsequently defendant in error entered judgment by confession in the court below for the balance due upon the note. On plaintiff

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in error's motion the judgment was opened and the general issue and special pleas of accord and satisfaction were filed by plaintiff in error.

After trial before a jury verdict was rendered finding the issues in favor of defendant in error in the sum of six hundred twenty-three dollars and forty cents and after motion for a new trial was overruled judgment was entered and this writ of error is prosecuted for reversal of the judgment.

It is contended that the verdict and judgment are against the weight of the evidence. The defense relied upon by plaintiff in error was that of accord and satisfaction and consequently the burden of proof rested upon plaintiff in error to prove his special pleas. The evidence on the part of plaintiff in error tended to show that the defendant in error agreed to accept back the laundry equipment in payment of the note which had been given for the balance due upon the equipment, but aside from plaintiff in error's own evidence there is no substantial corroboration of this version of the transaction. On the other hand the defendant in error testified that he did not agree to take back the laundry equipment in full satisfaction of the debt, but merely offered to help the plaintiff in error dispose of the equipment in order to reduce the amount of his claim. It would serve no good purpose to enter into any further discussion of the facts in the case for the reason that under the evidence in the record it was clearly a question of fact for the jury to determine and, in view of the present state of the record, we would not be warranted in setting aside the verdict of the jury.

Plaintiff in error's next contention is that the jury were improperly instructed and that the court improperly excluded evidence tending to show that the note and conditional sales contract were executed and delivered on Sunday. There was a dispute as to whether or not the note was executed upon a Sunday, but even though it was this would not effect the validity of the note. *Prout v. Hoy Oil Company*, 263 Ill. 54. *Richmond v. Moore*, 107 Ill. 429.

We have considered the points raised as to criticism of the instructions given on behalf of defendant in error and are of the opinion that the giving of such instructions was not reversible error.

We are of the opinion that there is no substantial error in the record or trial of the case and accordingly the judgment of the court below is affirmed.

Affirmed.

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in

TERM NO. 19.

AGENDA NO. 26.

In The
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
FEBRUARY TERM, A.D. 1930.

FILED

MAY 21 1930

Robert B. J.
CLERK OF THE APPELLATE
FOURTH DISTRICT OF ILL.

ASHER HOLZMAN, ELKAN HOLZMAN,
SIMON HOLZMAN, JOSEPH H.
COHEN, HARRY H. COHEN, ETC.,
Appellee,

Appeal from the Circuit
Court of Madison County.

vs.

Honorable J. R. Brown,
Judge Presiding.

W. C. GRAHAM, ETC.,
Appellant.

OPINION BY NEWHALL, J.

Appellee filed a suit in assumpsit as innocent purchaser before maturity and holder in due course of a trade acceptance and filed with the declaration an affidavit of claim. Appellants filed an amended affidavit of merits and two special pleas, to which appellee filed a motion to strike. The motion to strike was allowed and appellant elected to stand by his amended special pleas and affidavit of merits. Judgment was entered in favor of appellee and against appellant for the sum of five hundred thirty dollars and sixty-six cents, and appellant prosecutes this appeal from the order and judgment of the circuit court.

The declaration counts on a trade acceptance, signed by appellant in favor of the Adjustable Displays, Inc., who endorsed and delivered the trade acceptance to appellee.

The amended affidavit of merits and special pleas set up the defense of fraud and circumvention, and secondly, that the instrument sued on is not a negotiable instrument and is subject to all the defenses in the hands of an assignee which defendant would have if the suit were by the original payee of the instrument. The affidavit of merits further charges that at the time of the making of the trade acceptance a contract was made

between appellant and the Adjustable Displays, Inc., which had not been kept and performed by the latter company. The affidavit further charged fraud in the execution of the instrument sued on on the grounds of misrepresentation as to its contents.

Appellant contends that the affidavit of merits and special pleas set forth a good defense of fraud and circumvention, and secondly, that by reason of the wording of the acceptance the negotiability thereof had been destroyed, and that appellant was entitled to defend the same as though suit had been instituted by the original holder.

Appellee contends that the abstract of record fails to show that a bill of exceptions was filed showing the motion and order of the court striking from the files appellant's affidavit of merits and special pleas, and that in the absence of such a bill of exceptions the reviewing court will not pass upon the questions presented by this appeal.

The action of the trial court in sustaining a motion to strike an affidavit of merits and pleas from the files would be presumed to be correct, on appeal, in the absence of a bill of exceptions preserving the motion, decision, and exceptions to the ruling of the court. *Gaynor v. Hibernia Savings Bank*, 166 Ill. 578.

A plea which has been stricken from the files is no longer a part of the common law record and it can only be brought to the attention of the court by bill of exceptions. *Wittaman Co. v. Goetze*, 200 Ill. App. 108.

The abstract of record in this case does not show that any bill of exceptions was ever signed or filed with the clerk. A party bringing a cause to the appellate court is required to furnish an abstract which will fully present every error relied upon sufficiently for the determination of the cause without an examination of the written record. *Bedinger v. May*, 323 Ill. 187. Whatever is sought to be reviewed must be sufficiently set forth in the abstract to enable the court to consider it. *Davis v. Home*

Insurance Co., 233 Ill. App. 566. Failure to file a sufficient abstract warrants an affirmance of the case without consideration on its merits. Good v. Bank of Edwardsville, 209 Ill. 389.

None of the questions raised by this appeal can be considered by this court without a properly authorized bill of exceptions, which must be shown in a proper abstract. No errors being assigned and argued upon the record proper of this case, there is nothing that the Court can consider. People v. Cook, 324 Ill. 533.

For the reasons aforesaid the judgment of the circuit court of Madison County is affirmed.

Not to be reported in full Affirmed.

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IN THE
APPELLATE COURT OF ILLINOIS.
FOURTH DISTRICT .

February Term, A. D., 1930.

MAY 21 1930

CHARLES LEIGH,
vs.
R. B. MITCHELL,
Appellee,
Appellant.

Appeal from the City
Court of the City of
Marion, Illinois.

Opinion by Justice Fred G. Wolfe.

The appellant, R. B. Mitchell had his office in Chicago, Illinois. The plaintiff, Charles Leigh, was a resident of Marion, Illinois, and is engaged as a broker and real-estate agent in said City. The appellant owned a piece of property at Marion, Illinois, which he valued at \$20,000.00, which he was desirous of selling. On March 5th, 1929, the appellant and appellee entered into a contract for the sale of the property which is as follows: "In accordance with our understanding you are to have the exclusive handling of my home in Marion within a period of thirty days from date; no sale, of course, to be concluded until price, terms, etc., are approved by me."

Before this contract had been entered into the appellant Mitchell had had numerous conversations with one Harry Bracy relative to the sale of the property, but they had failed to come to terms and the deal had not been consummated. Immediately after entering into the contract between the appellant and the appellee, the appellee took up the matter of the sale of the property with the said Harry Bracy and submitted several offers by Bracy to Mitchell, the owner of the property. Mitchell either neglected or refused to answer these propositions.

The contract expired on April 4th and at that time a contract of sale had not been entered into between Bracy and Mitchell, but shortly after this Mitchell sold the property to Bracy on practically the same terms that Leigh, the appellee had submitted to Mitchell. Leigh claimed that he was the procuring cause of the sale and entitled to commission for the same. Appellant Mitchell refused to pay the commission, and Leigh started suit for the recovery of the same in Circuit Court of Marion Co., Illinois. A jury was waived and the case was heard before the Court who found in favor of the plaintiff and rendered judgment in his favor for the sum of \$550.00.

It is first contended that the appellee is not entitled to recover because he was not the procuring cause of the sale made to Bracy, on the ground that the appellant and Bracy had been negotiating for the sale of this same property for a year before the sale was finally consummated. It is evident that the appellant and Bracy were unable to come to terms before the contract of sale between appellant and appellee was entered into, and there was no dispute that the appellee made several attempts to sell the property to Bracy. It is a question of fact for the Court to decide whether the appellee was the procuring cause of the sale. The Court found that the appellee was the procuring cause of the sale and we are of the opinion that the evidence sustains this finding.

It is also contended that the appellee should not recover because he did not close the deal within the thirty days of the date of the contract. Ben Schull, the superintendent of the Coal Mine Company of which the appellant was the vice-president, testified that he had a conversation with the appellant in which the appellant said, "If he (Schull) would go to the appellee and tell him not to crowd Bracy that the appellant would take care of the appellee." The evidence shows that this was communicated to the appellee Leigh, and relying upon this statement he ceased his efforts to bring about the sale of

the property to Bracy. The appellant denies this statement. If the appellant did send such word to the appellee then appellee would have the right to rely upon it and not urge the buyer to complete the sale within the time limit stated in the contract, with the expectation that if a sale was made a short time later that then the appellant would pay him the commission that he had earned. Whether the appellant did or did not make this statement, is a question to be decided by the Court. The Court found this issue in favor of the appellee, and we think the evidence sustains this finding. Under such circumstances, the sale not being consummated within the time limit set-forth in the contract should not deprive the agent of his right to recover his commission. (Taylor vs. Wren, 79 Ill. p. 181; Frieland vs. Isenstein 191 Ill. App. 109; and Pridmore vs. Wilson, 159 Ill. App. 343)

Counsel for the appellant urged that the appellee failed to procure a purchaser ready, willing and able to buy at the price at which he was authorized to sell. It is argued that the sale price was to be \$20,000.00, but the contract itself makes no mention of any terms by which the property was to be sold, except that such terms must be approved by the owner of the property. The evidence shows that the appellee made an effort to sell the property and submitted several bids for the same, but appellant evidently did not co-operate with him in the sale of the property, but later sold the property on similar terms submitted by appellee.

At the conclusion of the trial each party submitted a number of propositions to be held as the law applicable in the case. The Court held those offered by the appellee as being the law applicable to the case and refused all of those offered by the appellant. The holding of the Court was proper for the same reason before stated in this opinion.

The Court found the commission that appellant owed appellee was \$550.00. This, it is contended, is not supported by the testimony in the case. The appellee testified

that the usual and customary commission in such cases at Marion, Illinois, was 5 per cent on the purchase price. The witness A. J. Binkley, a real-estate broker at Marion, Illinois, testified that the commission in such case is $2\frac{1}{2}$ per cent on the sale price. That is a question of fact to be decided by the Court. We think the Court properly held that \$550.00 would be a reasonable price for the service rendered.

We find no reversible error in the case and the judgment of the City Court of Marion, Illinois, is hereby affirmed.

Not to be reported in full

No. 3

No. 15

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MAY 28 1930

February Term, A. D. 1930.

FILED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

2581A 628⁵

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error,
vs.
DEWEY BIRD, WILLIAM BARGER and
RUBY MOULINE,
Plaintiffs in Error.

ERROR TO
County Court of
Pope County

Opinion by Judge Fred G. Wolfe.

The State's Attorney of Pope County filed an Information in the County Court under the Prohibition Act, charging William Barger, Dewey Bird, and Ruby Mouline with the violation of the said act. The first count of the Information charged the Defendants with the unlawful sale of intoxicating liquors. The second count charged them with the unlawful possession for the purpose of sale of intoxicating liquors fit for beverage purposes. The third count charged the unlawful transportation of intoxicating liquors. The Defendants waived trial by jury, and the cause was heard by the Court, who found them guilty under the second count, namely, of possessing intoxicating liquors as charged in the Information. Each of the Defendants was sentenced to pay a fine. They sued out a Writ of Error from the Supreme Court to review the judgment.

The Defendant Barger lived in a houseboat at the mouth of Lusk Creek, where it empties into the Ohio River at Golconda, in Pope County. He was living in the boat and working on the river as a steamboat engineer. He was a married man, but he and his wife had separated some three months before. Ruby Mouline was employed by him as cook and housekeeper, for which he paid her \$8.00 a week. Bird was a visitor at the houseboat when they were arrested.

A complaint for search warrant was signed on September 20, 1928, by the wife of Barger. The complaint stated that intoxicating liquors were manufactured, kept for sale, used, disposed of, and transported from a certain houseboat occupied and controlled by Barger, near the mouth of Lusk Creek, in the city of Golconda, and that her reason for believing what the complaint set forth, was that she did, on the 19th day of September, 1928, drink intoxicating liquor on said houseboat, and purchased a half-pint bottle of liquor from Ruby Mouline. The warrant commanded the officers to bring forthwith before the magistrate all persons in whose possession liquors were found. The Sheriff executed the warrant, and took with him three or four persons to assist him in making the search and seizure.

In the early part of the evening the officers went to the houseboat and made the search. A deputy sheriff testified that when they went in, Bird threw into the river a box of bottles containing home brew. This box was recovered. He also testified Bird cut a rope tied to a sack which was in the river, containing bottles of the home brew. The rope was tied to the end of the boat. They fished the sack containing the bottles out of the river.

The evidence showed that at the time the search was made and the warrant served on the Defendants, Ruby Mouline

was sick in bed. There is no testimony that connects her in any way with the possession of the intoxicating liquor, aside from the fact that she was employed by the Defendant Barger as his cook and housekeeper. At the time of the search of the houseboat, the Defendant Barger was not present, but on the trial of the case, he admitted that the home brew was his, that he thought he had a right to make it, but that he did not sell it.

The Plaintiffs in Error sued out their Writ of Error to the Supreme Court, complaining that their constitutional rights had been invaded. The Supreme Court, in the case of *The People vs. Bird*, 335 Illinois 447, transferred the case to this Court, for the reason that no constitutional questions were involved in the case.

Before the case was called for trial in the County Court of Pope County, the Defendants made a motion to quash the search warrant and suppress the evidence, for the reason that May Barger, the wife of William Barger, was not a competent person to sign the complaint for a search warrant. Also that the search was made in the night time, and that the warrant was only signed by one Justice of the Peace, and to make the warrant legal, it should have been signed by two Justices of the Peace. This motion was overruled by the Court, and such ruling is now urged as error in this Court. The Plaintiffs in Error are in no position to urge these questions as error, for the record shows no objection or exceptions to the ruling of the Court on this motion, and unless the record does show an exception has been preserved on a preliminary motion, it will not be considered by this Court on appeal or Writ of Error....

The People vs. Hyman Levin, 318 Illinois 227. *The People vs. Gabrys*, 329 Illinois 101. *Renfrow vs. Anthony*, 253 Appellate 116.

It is also urged by the Plaintiffs in error that the finding of the Court is contrary to the evidence. We are of the opinion that the evidence sufficiently shows that the Defendants, William Barger and Dewey Bird, are guilty of violating the Illinois Prohibition Act, as found by the Court, and the judgment as to them should be sustained. The only evidence against Ruby Mouline is that she was present at the time the search warrant was served, but was sick in bed, and shows no connection with her having had anything to do with the possession or sale of this intoxicating liquor. We are of the opinion that the evidence as shown by this record is not sufficient for the Court to find Ruby Mouline guilty of possession of intoxicating liquor, in violation of the Illinois Prohibition Law.

The judgment of the County Court of Pope County is hereby affirmed as to the Defendants, Dewey Bird and William Barger, and reversed as to the Defendant Ruby Mouline.

Not to be reported in

